

**Ensuring Accessibility for Subcontracted  
Agricultural Workers to Operational-level  
Grievance Mechanisms:  
A Study on Thailand's Sugar Industry**

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**Pawat Satayanurug**

von Thailand

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Prof. Dr. Christine Kaufmann  
und  
Prof. Dr. Tyler Giannini

Die Rechtswissenschaftliche Fakultät gestattet hierdurch die Drucklegung der vorliegenden Dissertation, ohne damit zu den darin ausgesprochenen Anschauungen Stellung zu nehmen.

Zürich, den 7. März 2018

Die Dekanin: Prof. Dr. Brigitte Tag

*For my family and my late grandmothers*

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## ABBREVIATIONS

B.E.	Buddhist Era
CANIETI	The Mexican Chamber of Electronics Industry
CAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment
CCC	The Civil and Commercial Code of Thailand
CED	International Convention for the Protection of All Persons from Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on Elimination of All Forms of Racial Discrimination
CEREAL	Center for Reflection and Action on Labor Issues (a Mexican NGO)
CHF	Swiss Franc (currency)
CMW	Convention on the Protection of the Rights of All Migrant Workers and of their Families
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
C011	Convention concerning the Right of Association and Combination of Agricultural Workers
C014	Weekly Rest (Industry) Convention
C019	Equality of Treatment (Accident Compensation) Convention
C029	Forced Labor Convention, 1930
C080	Final Articles Revision Convention, 1946
C088	Employment Service Convention, 1948
C100	Equal Remuneration Convention, 1951
C104	Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955
C105	Abolition of Forced Labor Convention, 1957
C111	Discrimination (Employment and Occupation) Convention, 1958
C116	Final Articles Revision Convention, 1961
C122	Employment Policy Convention, 1964

C123	Minimum Age (Underground Work) Convention, 1965
C127	Maximum Weight Convention, 1967
C138	Minimum Age Convention, 1973
C159	Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983
C182	Worst Forms of Child Labor Convention, 1999
C187	Promotional Framework for Occupational Safety and Health Convention, 2006
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
LPA	Labor Protection Act B.E. 2541 (1998)
MLC2006	Maritime Labor Convention, 2006
NAPs	OECD National Action Plans
NCPs	OECD National Contact Points
NGO	Non-Governmental Organization
NHRC	The National Human Rights Commission of Thailand
OCSB	The Office of Cane and Sugar Board of Thailand
OECD	Organization for Economic Cooperation and Development
OEM	Original Equipment Manufacturer
OHCHR	The United Nations High Commissioner for Human Rights
SCM	The Supply Chain Management
THB	Thai Baht (currency)
UN	United Nations
UNGP	United Nations Guiding Principles of Business and Human Rights
WBIP	The World Bank Inspection Panel

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## CHAPTER I

# Introduction, Scope, and Methodology

Against the scorching heat of the mid-day sun, the sea of agricultural workers harvesting sugar canes in the rural parts of Thailand has become a common sight, especially in the northeastern region. Their work helps propel Thailand to become the world's second largest sugar exporter, after Brazil.<sup>1</sup> While local sugar producers and exporters enjoy the lucrative benefit of the sizable share in the world's sugar industry, Thai agricultural workers still earn less than the minimum daily wage prescribed by the law, and their children sometimes assist them with their work at various plantations. Earning below minimum daily wages and the use of child labor are only examples of potential grievances encountered by agricultural workers. As these agricultural workers are employed in the private sector, grievances are likely caused or contributed to by private actors such as their direct employers or the sugar producers, as well as any other private actor with direct linkages to the employers or the sugar producers. States, however, are less likely to cause or contribute to such grievances as private actors.

Some of the grievances encountered by the agricultural workers could amount to human rights abuses. In other words, while human rights abuses could be considered grievances, not all grievances are human rights abuses. What constitutes human rights abuses is determined by whether human rights obligations under various international human rights instruments are violated. Traditionally, under the available international instruments States are the main duty-holders of human

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<sup>1</sup> Daniel Workman, *Sugar Export by Countries*, World's Top Export (May 17, 2017, 7:00 AM), <http://www.worldstopexports.com/sugar-exports-country/>.

rights obligations, and thus the current regime of international human rights law is only applicable to States. However, cases concerning human rights abuses have emerged and revealed that other entities, which may not be State entities<sup>2</sup>, are also capable of abusing human rights especially business enterprises. While business enterprises can invoke some human rights, such as the freedom of expression, as a rule they currently do not have any binding obligations under international human rights law. Also, the current international legal system *per se* does not provide any leeway to include business enterprises into the international human rights regime. With the aforementioned *status quo*, business enterprises are not obliged to respect human rights law or provide any form of grievance mechanisms for the human rights abuses or grievances they may have caused or contributed to. Consequently, the abused agricultural workers currently have limited access, if at all, to operational-level grievance mechanisms provided by business enterprises.

In principle, an operational-level grievance mechanism is an important tool in the fight against human rights abuses caused or contributed to by, or directly linked to, business operations. Fundamentally, it provides a platform for victims to have their voice heard, explain their cases, and be justly remediated. The entire scheme must be effective and efficient to ensure the delivery of justice and fairness to the victims of human rights abuses. This ambition is resonated clearly in Pillar III of the United Nations Guiding Principles on Business and Human Rights, widely referred to as the ‘UN Guiding Principles’ or the ‘UNGPs’<sup>3</sup>, which was unanimously endorsed in 2008 by the UN Human Rights Council. In brief, the UNGP Principle 31 establishes the “effectiveness criteria” for non-judicial grievance mechanisms, including the operational-level ones<sup>4</sup>. For consistency and coherence with the UNGP, this research will employ the UNGP term “operational-level grievance mechanisms” to refer to the ones administered or operated by business enterprises.

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<sup>2</sup> Human Rights Watch, *World Report 2016 Bangladesh*, (June 5, 2017, 10:35 AM), <https://www.hrw.org/world-report/2016/country-chapters/bangladesh#6a43ba>.

<sup>3</sup> U. N. (2011). *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework*.

<sup>4</sup> U.N.G.P., *supra* note 3, Principles 31, at 33.



Ideally, having effective operational-level grievance mechanisms will provide recourse to remedy to victims of human rights abuses. However, this enthusiastic call for “effectiveness” must be confronted with the reality of the situation, as different contexts could manifest different contributing factors, which may support or hinder the implementation of the UNGP “effectiveness criteria”. In other words, a study examining the actual implementation of the UNGP against a specific context is necessary and inevitable. For this purpose, this analysis selects Thailand’s sugar industry as the context. Currently, Thailand’s sugar industry is one of its largest agricultural industries, and an abundance of useful resources, such as for example the publications of its key players, was available to support the completion of this research.

## A. SCOPE OF THE RESEARCH

Under the general theme of Business and Human Rights, this research focuses on Pillar III of the UNGP – Access to Remedy. The foundational principle of Pillar III is to ensure that those affected by human rights violation be remediated in an effective manner. The scope of this research is defined as follows:

**Material scope: the operational-level grievance mechanisms provided by sugar producers** – The UNGP Pillar III mentions three general channels of access to remedy – State-based judicial mechanisms<sup>5</sup>, State-based non-judicial grievance mechanisms<sup>6</sup>, and non-State-based grievance mechanisms<sup>7</sup>. This research focuses on the last type – non-State-based grievance mechanisms, and further narrows the scope to “operational-level grievance mechanisms”. In brief, the UNGP Principle 29 suggests that “business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and

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<sup>5</sup> U.N.G.P., *supra* note 3, Principles 26, at 28.

<sup>6</sup> U.N.G.P., *supra* note 3, Principles 27, at 30.

<sup>7</sup> U.N.G.P., *supra* note 3, Principles 28, at 31.

communities who may be adversely impacted”<sup>8</sup>. The benefits of the operational-level grievance mechanisms, as highlighted in the Commentary to the UNGP, are the capability to identify adverse human rights impact as a part of an enterprise’s ongoing human rights due diligence and the competence to provide effective remedy as early as immediately after the victims are abused.<sup>9</sup> The operational-level grievance mechanisms in this research refers to the ones administered or operated by large business enterprises in a supply-chain. The term “business enterprises” is found in the UNGP documents, and is often used interchangeably with the term “companies” or “corporations”. For clarity and consistency, this research will use the term “business enterprises”. In the context of Thailand’s sugar industry, large business enterprises are large sugar producing companies, or hereinafter referred to shortly as “sugar producers”. Consequently, operational-level grievance mechanisms provided by sugar producers in Thailand’s sugar industry will be the material scope of this research. Additionally, references to large business enterprises in the context of this research will be termed “sugar producers”.

**Geographical and sectoral scope: Thailand’s sugar industry** – As previously mentioned, this research will focus on Thailand’s sugar industry, as sugar is considered one of Thailand’s top export agricultural products.

**Personal scope: subcontracted agricultural workers** – The International Labor Organization (ILO) instruments contain a variety of terms relating to “workers”. It is, therefore, indispensable to define at the outset on which types of workers this research will base its focus. The term “agricultural workers” will be used to refer to the workers operating in the agricultural industry.<sup>10</sup> The use of this term resonates from the Convention concerning the Right of Association and Combination of

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<sup>8</sup> U.N.G.P., *supra* note 3, Principles 29, at 31.

<sup>9</sup> U.N.G.P., *supra* note 3, Commentary to Principle 29, at 32.

<sup>10</sup> Some ILO instruments opt to use the term “rural workers” in a broader scope. See INT’L LABOUR ORG., RURAL WORKERS’ ORGANIZATION CONVENTION (Convention No. 141), June 23, 1975, art. 2.

Agricultural Workers (C011)<sup>11</sup>. In defining the term “agricultural workers”, C011 takes a broader approach by applying the convention to “all those engaged in agriculture”<sup>12</sup> in order to clearly extend the scope of application beyond the employment condition.<sup>13</sup> Therefore, this approach encompasses those employed in the organized sectors such as agricultural farms running on a commercial basis (or wage-earners) and those not employed by the organized sector including self-employed workers.<sup>14</sup>

This research, however, takes a narrower scope. As many agricultural workers who are not directly employed by sugar producers but by third-party entities such as subcontractors often have less, if not none-at-all, access to privileges that are normally accorded to those employed by sugar producers, this research utilizes the term “agricultural workers” beyond the employment condition as stated in the C011 and limits it to the agricultural workers without employment status with sugar producers. The limitation of this term reflects the current practice of sugar producers subcontracting agricultural work to subcontractors. Subcontractors then employ agricultural workers to work in plantations. This practice is sometimes referred to as “outsourcing” or “off-shoring”. Therefore, the term “agricultural workers” in this research refers to workers who are engaged in agriculture, who are employed by third-party subcontractors, and who are not employed by sugar producers. For clarity purpose, the term “subcontracted agricultural workers” will be used throughout this research, and self-employed agricultural workers (or those in the informal sectors) are excluded from the scope. In the supply chain world, this term refers to workers operating in the second-tier (or Tier Two) companies or suppliers of the supply chain.<sup>15</sup>

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<sup>11</sup> INT’L LABOUR ORG., CONVENTION CONCERNING THE RIGHTS OF ASSOCIATION AND COMBINATION OF AGRICULTURAL WORKERS (Convention No. 11), May 11, 1923.

<sup>12</sup> *Id.*, art. 1.

<sup>13</sup> INT’L LABOUR OFFICE, GIVING A VOICE TO RURAL WORKERS, 21 (2015).

<sup>14</sup> *Id.*, at 22.

<sup>15</sup> In the supply chain, there are different terms used to describe companies or suppliers based on commercial relationship between the manufacturer and the supplier. The commonly used terms are OEM (Original Equipment

**Substantive scope: assessing the accessibility of operational-level grievance mechanisms** – While the UNGP Principle 31 provides many effectiveness criteria<sup>16</sup>, this research will limit its scope to only study one of them – the “accessibility” criterion. At present, while the UNGP Principle 29 suggests the involvement of business enterprises in providing effective operational-level grievance mechanisms to victims of human rights abuse<sup>17</sup>, this remains merely a suggestion. Currently, business enterprises are not obliged under any international human rights instrument to provide any form of remediation. The UNGP Principle 15, which falls under Pillar II, only mentions that business enterprises “should” have “processes to enable the remediation of any adverse human rights impact they cause or to which they contribute”<sup>18</sup>. Furthermore, the UNGP Principle 13, which provides “requirements” for fulfilling the corporate responsibility to respect human rights, does not expressly impose either the requirement or the obligation for business enterprises to provide remediation through operational-level grievance mechanisms.<sup>19</sup> The UNGP Principle 13 only provides for general corporate responsibility and distinguishes different levels of corporate responsibility based on the depth of involvement between business enterprises and adverse human rights impact. Business enterprises that cause or contribute to adverse human rights impact are required to avoid doing so and address such impacts when they occur<sup>20</sup>. To a lesser extent, business enterprises are required to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships<sup>21</sup>.

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Manufacturer), Tier One, Tier Two, and Other Tiers. The OEM refers to a company that manufacture a final product for consumers. Tier One refers to a direct supplier to the OEM, and Tier Two is a direct supplier to the Tier One. For more information, see David Sarokin, *Difference between Tier 1 and Tier 2 Companies*, (Apr. 27, 2016, 4:50 PM), <http://smallbusiness.chron.com/difference-between-tier-1-tier-2-companies-25430.html>.

<sup>16</sup> U.N.G.P., *supra* note 3, Principles 31, at 33.

<sup>17</sup> U.N.G.P., *supra* note 3, Principles 29, at 31.

<sup>18</sup> U.N.G.P., *supra* note 3, Principles 15, at 15-16.

<sup>19</sup> U.N.G.P., *supra* note 3, Principles 13, at 14-15.

<sup>20</sup> U.N.G.P., *supra* note 3, Principles 13a, at 14-15.

<sup>21</sup> U.N.G.P., *supra* note 3, Principles 13b, at 14-15.

Though this research acknowledges the ongoing debate on whether the corporate responsibility to respect human rights extends to require business enterprises to provide remediation as such<sup>22</sup>, it will not include and discuss this debate further. It bypasses such debate, and operates on the premise that business enterprises are willing to or obliged to provide effective remediation for victims of human rights abuse that they cause or to which they contribute through their operational-level grievance mechanisms.

## B. RESEARCH QUESTIONS

The questions most frequently asked about the UNGP concern its implementation. Essentially most, if not all, aspects advocated by the UNGP have faced strong criticisms, resistance, and defiance. In an attempt to explore the practical issues of the UNGP's "forgotten pillar"<sup>23</sup>, this research addresses the implementation of UNGP Pillar III – the access to remedy. The analysis of this Pillar will probably start to attract more attention, as the OHCHR will soon complete its Accountability and Remedy Project setting out recommendations to make domestic judicial mechanisms "fairer and more effective"<sup>24</sup>.

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<sup>22</sup> Simon Zadek, *The meaning of accountability*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 242 (Dorothee Baumann-Pauly, Justine Nolan eds., 1st ed. 2016).

<sup>23</sup> Sarah McGrath, *Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses*, (May 13, 2016, 3:56 PM), <http://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and>.

<sup>24</sup> U.N. OHCHR, *Business and Human Rights: The OHCHR Accountability and Remedy Project – An initiative to contribute to a fairer and more effective system of domestic law remedies, in particular in cases of gross human rights abuses*, (May 13, 2016, 4:28 PM), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyWorkPlans.pdf>.

While the State-based grievance mechanisms are often in the spotlight, the non-State-based grievance mechanisms are rather neglected and operational-level grievance mechanisms receive even less attention. One of the most-cited letter documents, among very little literature that even mentions operational-level grievance mechanisms, was issued by the Office of the High Commissioner for Human Rights (OHCHR) responding to some alleged practical concerns of the *Olgeta Meri Igat Raits* operational-level grievance mechanism<sup>25</sup>. In the letter, the OHCHR acknowledges that the UNGP recognize the importance of the operational-level grievance mechanisms as they “may fulfill an important role in enabling victims to have their grievance heard and in obtaining remedy for harm suffered”<sup>26</sup>. In addition, the OHCHR stresses that this important role by business enterprises must be assessed against applicable standards on remedy<sup>27</sup>.

This research reiterates the OHCHR’s opinion and acknowledges the scarcity of academic literature on operational-level grievance mechanisms. Consequently, the study aims to provide scholastic literature regarding the implementation of the UNGP Pillar III on operational-level grievance mechanisms, and will be conducted against the context of Thailand’s sugar industry. More specifically, the focus of this research will be the access to remedy for subcontracted agricultural workers working in the Tier-Two of the supply chain. For organizational purposes, the research questions are provided as follow.

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<sup>25</sup> U.N. OHCHR, *Re: Allegation regarding the Porgera Joint Venture remedy framework*, (Apr. 27, 2017, 10:50 AM) <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf>, (UN OHCHR issued a letter in 2011 to provide an opinion on some of procedural and substantive issues raised by the petitioner – the NGO Mining Watch Canada (MWC) – concerning the Porgera remediation framework – a remediation initiative developed by Barrick Gold Corporation and the Porgera Joint Venture for women who have been victims of sexual violence by security personnel at the Porgera mine in Papua New Guinea.).

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 6. (an example of applicable standards on remedy is “the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation”).

*Question 1:*

**Are there any operational-level grievance mechanisms that are currently available for and accessible to subcontracted agricultural workers in Thailand's sugar industry, and, if yes, what are they?**

In Thailand, operational-level grievance mechanisms are still at a very immature stage. Business enterprises independently draft their own procedure for their operational-level grievance mechanisms, if any exist. More specifically, it is unclear whether the existing operational-level grievance mechanisms extend their scope to encompass all categories of agricultural workers, including subcontracted agricultural workers working in the Tier-Two of the supply chain.

*Question 2:*

**What are legal and practical barriers that could potentially prevent subcontracted agricultural workers in Thailand's sugar industry from gaining access to operational-level grievance mechanisms, and how can the barriers be reduced or eliminated?**

After a preliminary mapping of the existing operational-level grievance mechanisms in Thailand's sugar industry, the research further explores legal and practical barriers that could potentially prevent agricultural workers from gaining access to the operational-level grievance mechanisms. It will assess the accessibility of the existing operational-level grievance mechanisms against one of the effectiveness criteria set out by the UNGP Principle 31<sup>28</sup> - the accessibility. According to the UNGP Principle 31, "accessibility" can be ensured by having the operational-level grievance mechanisms "being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access"<sup>29</sup>. Furthermore, barriers to access may include "a lack of awareness of the

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<sup>28</sup> U.N.G.P., *supra* note 3, Principles 31, at 33.

<sup>29</sup> U.N.G.P., *supra* note 3, Principles 31 (b), at 33.

mechanism, language, literacy, costs, physical location and fear of reprisal”<sup>30</sup>.

It must be reiterated that assessing the accessibility of the existing operational-level grievance mechanisms will be limited to the context of subcontracted agricultural workers operating in the Tier-Two of the supply chain. Without any legal relationship with sugar producers, subcontracted agricultural workers seem to lack preliminary standing to gain access to operational-level grievance mechanisms administered or operated by the sugar producers and are likely to be more vulnerable to legal and practical barriers than the employees of the sugar producers. This research will also attempt to establish linkage between sugar producers and subcontracted agricultural workers based on the UNGP guidelines as well as on other available legal grounds.

*Question 3:*

**Can an operational-level grievance mechanism based on the UNGP accessibility criteria and/or guidelines be developed in a manner that are contextually appropriate and tailored to Thailand’s sugar industry, and, if yes, how?**

To answer this question, the research will utilize information gathered from the assessment of existing operational-level grievance mechanisms, the identification of grievances, the establishment of linkage between sugar producers and subcontracted agricultural workers, and the analysis of the UNGP accessibility criteria to develop recommendations for sugar producers, as well as other interested business enterprises. The recommendations should serve as the UNGP-based guidelines for developing future pilot operational-level grievance mechanisms. While the recommendations will be inevitably based on the context of Thailand’s sugar industry, they may also serve as a pilot document and reference for future studies on other industries and/or countries.

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<sup>30</sup> U.N.G.P., *supra* note 3, Commentary to Principle 31 (b), at 34.



## **C. METHODOLOGY**

To address the research questions, a number of methodologies will be employed throughout. For ease of comprehension, the methodologies will be presented in the stages as follow.

- 1) The research utilizes the documentary research method to study the development of business and human rights and the UNGP, whereas heightened attention will be given to the Pillar III. Further, the documentary research method will be used to identify grievances based on international human rights law, Thailand's national legislation, and current practices of operational-level grievance mechanisms administered or operated by various business enterprises.
- 2) To examine the existing operational-level grievance mechanisms a qualitative study will be conducted regarding the grievances experienced by subcontracted agricultural workers as well as the legal and practical barriers that prevent subcontracted agricultural workers from effectively gaining access to the remedies. At this stage, a series of structured interviews will be conducted, with sample interviewees ranging from subcontracted agricultural workers and subcontractors, to the executives at a major business enterprise in the sugar industry.
- 3) This research will then conduct a comparative study to explore relevant laws in ASEAN countries regarding the scope of employers' obligations and liabilities towards their non-employees in the supply-chain.

## CONCLUSION

Chapter I provided an introduction to this research, identified research questions and scope, and explained the methodology that will be utilized in this research. Overall, this research will study the implementation of the UNGP Pillar III's "effectiveness criteria". More specifically, its scope is focused on the accessibility (*substantive scope*) of subcontracted agricultural workers (*personal scope*) to operational-level grievance mechanisms provided by sugar producers (*material scope*). The analysis will be conducted against the context of Thailand's sugar industry (*geographical scope*) with legal references to Thailand's international human rights obligations and national legislations.

## CHAPTER II

# Remedying the Victims: Revisiting the Global Standards for Access to Remedy

Studying the implementation of operational-level grievance mechanisms requires the preliminary exploration of the global standards for access to remedy, which to date can be found in a number of notable international documents. Developed out of the correlation between business and human rights that has received international recognition as evidenced by a series of meetings and the release of various guideline initiatives, such as the UN Global Compact<sup>31</sup> and the OECD Guidelines for Multinational Enterprises<sup>32</sup>. These documents recognize that activities of business enterprises can cause various negative impacts on human rights<sup>33</sup>. Subsequently, the most iconic instrument to date relating to business and human rights was introduced – the UN Guiding Principles on Business

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<sup>31</sup> U.N. Global Compact, *The Ten Principles of the UN Global Compact*, <https://www.unglobalcompact.org/what-is-gc/mission/principles>. (Developed in 2000, the UN Global Compact contains a set of 10 principles relating to human rights which companies are encouraged to participate.).

<sup>32</sup> O.E.C.D. (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en>. (The OECD Guidelines are recommendations created by governments to multinational enterprises aiming to advocate for responsible business conduct.).

<sup>33</sup> For instance, the UN Global Compact Principle 2 requests companies to “make sure that they are not complicit in human rights abuses”. In addition, the OECD Guidelines in their General Policies section suggests that enterprises should “respect the internationally recognized human rights of those affected by their activities”.

and Human Rights<sup>34</sup>. This chapter aims to provide a brief synopsis of the development of this representative instrument. More specifically, it will provide justification for the research's greater emphasis on the Pillar III, the access to remedy for victims of adverse human rights impacts caused or contributed to by, or directly linked to business enterprises.

## **A. CREATING GLOBAL HUMAN RIGHTS STANDARDS FOR BUSINESSES**

Human rights, as an idea, are inherent in all human beings without subjecting to discrimination of any kind. To set standards for human rights, many international instruments have codified them in various aspects. The most general codification of human rights standards can be found in the three core documents known as “the International Bill of Human Rights” – the Universal Declaration of Human Rights<sup>35</sup>, the International Covenant on Civil and Political Rights<sup>36</sup>, and the International Covenant on Economic, Social and Cultural Rights<sup>37</sup>. It must be noted at the outset that these core documents, as well as other human rights-related international documents, are only binding for States<sup>38</sup>. Only States can be parties, which means they have an obligation to respect human rights, to protect individuals and groups against human rights abuses, and to fulfill actions to facilitate the enjoyment of basic human rights.

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<sup>34</sup> U.N.G.P., *supra* note 3.

<sup>35</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), 71.

<sup>36</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>37</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>38</sup> Justine Nolan, *Mapping the movement: the business and human rights regulatory framework*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 34 (Dorothee Baumann-Pauly, Justine Nolan eds., 1st ed. 2016).

Evidence reveals, however, that business enterprises can also cause, contribute to or have direct links to many adverse human rights impacts. From forced or bonded labor working in sweatshop factories to very young children working aimlessly at various plantations, these unfortunate situations are parts of business operations controlled by business enterprises. After observing the discourse in the existing international human rights regime, Professor John Ruggie interestingly asked, “can multinational corporate conduct be regulated to prevent or mitigate such human costs?”<sup>39</sup> At the beginning, his quest to find answers to this profound question was met with some resistance. For instance, the proposal to create new Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises<sup>40</sup> was opposed by business enterprises, as they regarded the Norms as “the privatization of human rights” by transferring States’ obligations to businesses. Had the Norms been enacted, they would have imposed some human rights obligations directly on business enterprises<sup>41</sup>. Despite the initial opposition, the emergence of campaigns and lawsuits against business enterprises relating to human rights responsibilities prompted business enterprises to seek greater clarity on the matter<sup>42</sup>. As some governments found an intergovernmental process unachievable, Professor John Ruggie noted that it was high time that “a common terrain” be established<sup>43</sup>, paving the path towards more studies on this matter. This so-called common terrain was materialized in 2005, when Professor John Ruggie was appointed the UN Special Representative on the issue of human rights and transnational corporations and tasked with the role to help develop global initiatives on business and human rights.

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<sup>39</sup> JOHN RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS*, xvi (W. W. Norton & Company, 1st ed. 2013).

<sup>40</sup> U.N. OHCHR, *The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). (The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises was drafted in 2003 by the UN Sub-Commission of the Promotion and Protection of Human Rights. The Norms was presented to the then Commission on Human Rights but was not exercised.).

<sup>41</sup> RUGGIE, *supra* note 39, at xvii.

<sup>42</sup> RUGGIE, *supra* note 39, at xviii.

<sup>43</sup> RUGGIE, *supra* note 39, at xviii.

## 1. Developing the United Nations Guiding Principles on Business and Human Rights

In 2011, the United Nations endorsed the Guiding Principles on Business and Human Rights. Prepared by the team of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations (SRSG) Professor John Ruggie, the official name of the guiding principles is “the Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework” or in short the UNGP. The UNGP elaborate on the State duty to protect human rights, the corporate responsibility to respect human rights, and the need for effective remedies following human rights abuses<sup>44</sup>. Regarded as a challenging initiative<sup>45</sup>, the UNGP serve as the “authoritative focal point” for actions, which define the parameters within which States and business enterprises should further proceed, as well as clarifying roles and responsibilities that States and business enterprises should uphold<sup>46</sup>. In addition, the UNGP provide practical guidance, endorsed in the global common platform, for all stakeholders to ensure consistency in terms of implementation<sup>47</sup>.

According to the UNGP,

- “All States have a duty to protect everyone within their jurisdiction from human rights abuses committed by companies;
- Companies have a responsibility to respect human rights – i.e., avoid infringing on the rights of others wherever they operate and whatever their size or industry, and address any impact that

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<sup>44</sup> U.N.G.P., *supra* note 3.

<sup>45</sup> RUGGIE, *supra* note 39, at xix.

<sup>46</sup> BUS. AND HUMAN RIGHTS ORG., *The UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights* (Apr. 29, 2016, 4:30 PM), <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>.

<sup>47</sup> Beata Faracik, *Implementation of the UN Guiding Principles on Business and Human Rights*, The European Parliament Subcommittee on Human Rights (DROI) (2017) (Apr. 30, 2016, 10 AM), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO\\_STU\(2017\)578031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf).

- does occur. This responsibility exists independently of whether States fulfill their obligations; and
- When abuses occur, victims must have access to effective remedy, through judicial and non-judicial grievance mechanisms.”<sup>48</sup>

The UNGP are intended to apply to all States and all business enterprises<sup>49</sup>. Though the jurisdictional and territorial reach of the State duty to protect has not been clearly defined, the UNGP Principle 2 clarifies that States are not “generally required under international human rights law to regulate extraterritorial activities of businesses domiciled in their territory and/or jurisdiction”<sup>50</sup>. Inferring from this statement, States can generally extend the extraterritorial application of the UNGP, provided they have a jurisdictional basis. Furthermore, States are encouraged to take greater extraterritorial steps in conflict-affected areas<sup>51</sup>.

Despite their authoritative character, the UNGP are currently not an international instrument bearing a legal status. While the UNGP are formally non-binding, they do have legal effects. Therefore, they are considered soft-law<sup>52</sup>. However, as the UNGP have greatly evolved with wide participations from all stakeholders, some critics argue that the UNGP can amount to soft-law obligations<sup>53</sup>. Nevertheless, as many of the principles mirror the States’ international human rights obligations

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<sup>48</sup> U.N. OHCHR, FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 7 (2014).

<sup>49</sup> Chip Pitts, *The United Nations ‘Protect, Respect, Remedy’ Framework and Guiding Principles*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 52 (Dorothee Baumann-Pauly, Justine Nolan eds., 1st ed. 2016).

<sup>50</sup> U.N.G.P., *supra* note 3, Commentary to General Principle, at 2.

<sup>51</sup> U.N.G.P., *supra* note 3, Principle 7, at 8-9.

<sup>52</sup> Justine Nolan, *All Care, No Responsibility?*, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS: NEW EXPECTATIONS AND PARADIGMS 5, 13-14 (Lara Blecher, Nancy Kaymar Stafford and Gretchen Bellamy eds., 1st ed. 2015).

<sup>53</sup> RUGGIE, *supra* note 39, at 124.

found in various international human rights instruments<sup>54</sup>, the UNGP can be implemented through domestic laws enacted by national legislations. Essentially, States are obliged to comply with the UNGP when the principles are identical to the international obligations to which the States are already bound, and business enterprises are encouraged to respect human rights, particularly those expressed in the International Bill of Human Rights<sup>55</sup>.

Conceptually, the UNGP is rested on three pillars, and the following sections provide a brief narration of each of them to illustrate how the UNGP sets human rights standards for specific actors.

## **2. Pillar I: The State duty to protect human rights**

The UNGP Pillar I addresses the State “Duty to Protect”. It reaffirms the existing international human rights obligations born by the States, and highlights that the States are in the position to take proactive measures to fulfill this duty<sup>56</sup>. The core concept of the duty to protect is the protection rendered by States against human rights abuse caused by third parties, including business enterprises<sup>57</sup>. This concept is embedded in international human rights law, by first committing States themselves to refrain from violating human rights of persons within their jurisdiction, and second ensuring that all right-holders enjoy the realization of human rights enshrined in the international human rights law<sup>58</sup>. The second

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<sup>54</sup> The UNGP Principle 12 clearly refers the responsibility of business enterprises to respect human rights to internationally recognized human rights such as the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.

<sup>55</sup> U.N.G.P., *supra* note 3, Principle 12, at 13-14.

<sup>56</sup> Some proactive measures are stated in UNGP Principle 3, such as enforcing laws and policies aiming at requiring business enterprises to respect human rights.

<sup>57</sup> RUGGIE, *supra* note 39, at 83.

<sup>58</sup> RUGGIE, *supra* note 39, at 84.



prong, thus, obliges States to protect all right-holders against potential human rights abuses by third parties, including business enterprises.

Essentially, this concept does not automatically impose direct responsibility on States in instances when business enterprises domiciled in their respective jurisdiction and/or territory commit human rights abuses. Instead, States may breach their international human rights obligations when there is proof that the following occurs: first, States fail to take appropriate steps to prevent human rights abuses caused by business enterprises; second, States fail to investigate, punish, and provide redress after the human rights abuses occur; and third, human rights abuses are caused by business enterprises with direct connection to States, such as business enterprises that are state-owned or act as state-agents<sup>59</sup>. Consequently, the UNGP Pillar I provides the following guidelines for States to avoid the potential breach of their existing international human rights obligations:

- 1) **Protect** – States must protect against human rights abuses within their territory and/or jurisdiction caused by third parties, including business enterprises<sup>60</sup>.
- 2) **Prevent** – States must take appropriate steps to prevent human rights abuses from occurring<sup>61</sup>. As for appropriate steps, States are encouraged to implement as many preventative and remedial measures as possible “to ensure equality before the law”<sup>62</sup>. For instance, States should enforce laws or provide guidance that are aimed at, or have the effect of, requiring business enterprises to respect human rights throughout their operations<sup>63</sup>.
- 3) **Investigate, Punish, Redress** – States must take appropriate steps to investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication<sup>64</sup>.

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<sup>59</sup> RUGGIE, *supra* note 39, at 84.

<sup>60</sup> U.N.G.P., *supra* note 3, Principle 1, at 3.

<sup>61</sup> *Id.*

<sup>62</sup> U.N.G.P., *supra* note 3, Commentary to Principle 1, at 3.

<sup>63</sup> U.N.G.P., *supra* note 3, Principle 3, at 4-5.

<sup>64</sup> U.N.G.P., *supra* note 3, Principle 1, at 3.

- 4) **Set clear expectations** – States should set clear expectations that all business enterprises domiciled in their territory and/or respective jurisdiction respect human rights throughout their operation<sup>65</sup>.
- 5) **Promote** – States should promote respect for human rights by business enterprises with which they conduct commercial transaction<sup>66</sup>.

### 3. Pillar II: The corporate responsibility to respect human rights

The UNGP Pillar II introduces the corporate “Responsibility to Respect”. It suggests that business enterprises should have responsibility to conduct their business operations in a manner that respects human rights. This concept differs from the state duty to protect; it creates a distinct responsibility to be born directly by business enterprises. The term “responsibility” is used instead of “obligation” to signify the former differs from legal duties<sup>67</sup>, as a certain degree of reluctance by legal academia to impose direction obligations on corporations still exists<sup>68</sup>. Under Pillar I, States have the obligation to protect against human rights abuses in various forms, including abuses caused by business enterprises within their territory and/or jurisdiction<sup>69</sup>. However, some States may be unable or unwilling to enforce this obligation, or the scope of applicable conducts may be limited as many States have not ratified all international human rights treaties<sup>70</sup>. As a result, introducing the corporate

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<sup>65</sup> U.N.G.P., *supra* note 3, Principle 2, at 3-4.

<sup>66</sup> U.N.G.P., *supra* note 3, Principle 6, at 8.

<sup>67</sup> RUGGIE, *supra* note 39, at 91.

<sup>68</sup> Jernej Letnar Čerňič, *An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights*, in HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS 144-145 (Jernej Letnar Čerňič, Tara Van Ho eds., 2015); see also Radu Mares and Cedric Ryngaert, Address at the GLOTHRO Project Final Conference in Turku, Finland (Mar. 27-29, 2014).

<sup>69</sup> U.N.G.P., *supra* note 3, Principle 1.

<sup>70</sup> RUGGIE, *supra* note 39, at 90.

responsibility to respect as an independent concept in the UNGP is intended to expand the possibility of compliance by business enterprises by means of having a separate responsibility.

The substance of the corporate responsibility to respect is derived from an existing, well-established social norm<sup>71</sup>, where society collectively expects business enterprises to respect human rights over the course of their operations. Being a social norm of “near-universal recognition”<sup>72</sup>, the corporate responsibility to respect is already largely acknowledged by business enterprises<sup>73</sup> and is already enforced by some means of social sanctions<sup>74</sup>. Instead of codifying this norm, the UNGP refer to substantive rights found in internationally recognized human rights, particularly those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work<sup>75</sup>.

The foundational principles of the corporate responsibility to respect in the UNGP are straightforward. First, business enterprises should avoid infringing on the human rights of others and address the human rights harm that they are involved in<sup>76</sup>. Measures taken to address the human rights harm must be adequate and appropriate<sup>77</sup>, and must not undermine

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<sup>71</sup> RUGGIE, *supra* note 39, at 91.

<sup>72</sup> RUGGIE, *supra* note 39, at 92.

<sup>73</sup> RUGGIE, *supra* note 39, at 92-93. (Many business enterprises have policies “to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent”. Furthermore, various CSR initiatives, the joining of the UN Global Compact by many business enterprises, and the acceptance of the OECD Guidelines for Multinational Enterprises are also signs of acknowledgement of the corporate responsibility to respect.).

<sup>74</sup> RUGGIE, *supra* note 39, at 93. (For instance, many complaints have been filed to relevant authorities, such as the National Contact Point (NCP) under the OECD Guidelines, alleging business enterprises for not respecting human rights in their operations.).

<sup>75</sup> U.N.G.P., *supra* note 3, Principle 12, at 13-14.

<sup>76</sup> U.N.G.P., *supra* note 3, Principle 11, at 13.

<sup>77</sup> U.N.G.P., *supra* note 3, Commentary to Principle 11, at 13.

the States from fulfilling their own human rights obligations<sup>78</sup>. Second, the UNGP canvas the scope of application to encompass both actual and potential human rights impacts<sup>79</sup>, which are caused or contributed to both business enterprises themselves and/or by activities conducted by entities directly linked to the business enterprises<sup>80</sup>.

The UNGP formulate the concept of the corporate responsibility to respect to be clear and predictable<sup>81</sup>, thereby aiding business enterprises in their comprehension and eventual implementation. Consequently, the UNGP Pillar II provides the following guidelines for business enterprises to avoid breaching their responsibility to respect human rights:

- 1) **Avoid** – Business enterprises should avoid causing or contributing to adverse human rights impacts through their own activities<sup>82</sup>, or prevent or mitigate adverse human rights impacts which are directly linked to their operations, products or services by their business relationships, even if the business enterprises have not contributed to those impacts<sup>83</sup>.
- 2) **Have policy commitment** – Business enterprises should have a policy commitment to respect human rights<sup>84</sup>. This commitment can be expressed in an approved and well-informed statement of policy<sup>85</sup>, it must be publicly available<sup>86</sup> and embedded throughout their functions without exception<sup>87</sup>.
- 3) **Carry out human rights due diligence** – Human rights due diligence refers to the process of identifying and addressing human rights impact that business enterprises may cause or contribute throughout their operations<sup>88</sup>. The process should be

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<sup>78</sup> *Id.*

<sup>79</sup> RUGGIE, *supra* note 39, at 100.

<sup>80</sup> U.N.G.P., *supra* note 3, Principle 13(b), at 14-15.

<sup>81</sup> RUGGIE, *supra* note 39, at 100.

<sup>82</sup> U.N.G.P., *supra* note 3, Principle 13(a), at 14-15.

<sup>83</sup> U.N.G.P., *supra* note 3, Principle 13(b), at 14-15.

<sup>84</sup> U.N.G.P., *supra* note 3, Principle 15(a), at 15-16.

<sup>85</sup> U.N.G.P., *supra* note 3, Principles 16(a), 16(b), at 16-17.

<sup>86</sup> U.N.G.P., *supra* note 3, Principle 16(d), at 16-17.

<sup>87</sup> U.N.G.P., *supra* note 3, Principle 16, at 16.

<sup>88</sup> U.N.G.P., *supra* note 3, Principle 17, at 17-19.

ongoing<sup>89</sup>, involve extensive consultation with all relevant stakeholders including experts and affected groups<sup>90</sup>, and have its effectiveness consistently tracked based on qualitative and quantitative indicators<sup>91</sup>.

- 4) **Provide remediation** – Business enterprises must ensure that any adverse human rights impact they have caused or contributed to will be appropriately remediated through legitimate process<sup>92</sup>.

#### **4. Pillar III: Access to remedy for victims of business-related abuses**

Access to remedy has already been embedded in the first two UNGP Pillars. As an obligation, States are required to take appropriate steps to prevent, investigate, punish, and redress human rights abuse through many means, including adjudication<sup>93</sup>. State-based adjudication *per se* is a form of access to remedy, and failing to provide this avenue may result in a breach of States' international human rights obligations. Additionally, business enterprises are advised to provide for or cooperate in remediation through legitimate process after having caused or contributed to human rights abuses<sup>94</sup>. Whether as a state duty or through corporate responsibility, the UNGP recognize the importance of having access to remedy as one of the foundational principles in the international human rights system by dedicating the last Pillar specifically to this matter.

Conceptually, providing effective access to remedy is among the key elements to ensure and promote greater accountability. Accountability, in principle, consists of two elements – answerability and

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<sup>89</sup> U.N.G.P., *supra* note 3, Principle 17(c), at 18.

<sup>90</sup> U.N.G.P., *supra* note 3, Principle 18, at 19-20.

<sup>91</sup> U.N.G.P., *supra* note 3, Principle 20, at 22-23.

<sup>92</sup> U.N.G.P., *supra* note 3, Principle 22, at 24-25.

<sup>93</sup> U.N.G.P., *supra* note 3, Principle 1, at 3..

<sup>94</sup> U.N.G.P., *supra* note 3, Principle 22, at 24-25.

enforceability<sup>95</sup>. To put it simpler, holding States or business enterprises accountable for failing to fulfill their duty or responsibility is to require them to explain their actions or non-actions (answerability) and to punish them for human rights abuses they have caused or contributed to (enforceability)<sup>96</sup>. Accountability, therefore, is an essential tool to ensure that States and business enterprises perform what they are obliged to do or responsible for.

The UNGP Pillar III is designed to install accountability in the business and human rights arena. To achieve this, the UNGP identify existing grievance mechanisms and categorize them into State-based judicial grievance mechanisms, State-based non-judicial grievance mechanisms, and non-State-based grievance mechanisms. The UNGP explicitly highlight that providing access to State-based grievance mechanisms, whether judicial or non-judicial, is part of every States' duty to protect against business-related human rights abuses<sup>97</sup>, and advise business enterprises to establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted<sup>98</sup>. More details on the UNGP Pillar III, which is the core subject of this research, will be provided in the following section.

## **B. IMPORTANCE OF PILLAR III – ENSURING THE RIGHT TO EFFECTIVE REMEDY FOR VICTIMS**

Fundamentally, all Pillars in the UNGP are equally important and intertwined. They form the backbone of this groundbreaking document and emphasize the significance of human rights in business operations. The coexistence of all Pillars strengthens the complementary roles of all

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<sup>95</sup> Zadek, *supra* note 22, at 240.

<sup>96</sup> Zadek, *supra* note 22, at 241.

<sup>97</sup> U.N.G.P., *supra* note 3, Principle 25, at 27-28.

<sup>98</sup> U.N.G.P., *supra* note 3, Principle 29, at 31-32.

stakeholders<sup>99</sup>. On the one hand, States must be able and willing to protect against human rights abuses caused by business enterprises domiciled in their respective jurisdiction and/or territory. On the other hand, business enterprises must respect human rights by refraining from causing or contributing to abuses in the course of their business operations. When human rights abuses occur, States and business enterprises must ensure that the victims have recourse to effective remedy in an appropriate forum.

While all three Pillars are fundamentally regarded as equally important, past studies on business and human rights have concentrated on the first two<sup>100</sup> – the substantive parts of the UNGP. During the Fourth Annual UN Forum on Business and Human Rights, one of the most prominent issues discussed was a concurring observation that the last pillar of the UNGP was “still largely overlooked”<sup>101</sup>. The event called for a concerted effort to explore and develop the substance on this so-called “forgotten pillar”<sup>102</sup>. Likewise, the OHCHR Report also highlights that Pillar III “has arguably received the least attention”<sup>103</sup>. Consequently, the Human Rights Council adopted a resolution that calls for an improvement of the access to remedy<sup>104</sup> by encouraging States and business enterprises to fulfill their respective obligations and/or responsibilities under the UNGP by finding ways to improve the existing grievance mechanisms<sup>105</sup>. Furthermore, the UN Working Group on Business and

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<sup>99</sup> U.N. OHCHR, FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 9 (2014).

<sup>100</sup> GLOBAL BUSINESS INITIATIVE ON HUMAN RIGHTS AND CLIFFORD CHANCE, *Access to Remedy: The Next Frontier?* (Jul. 15, 2016, 9:45 AM), <http://www.global-business-initiative.org/wp-content/uploads/2017/03/Access-to-Remedy-The-Next-Frontier.pdf>.

<sup>101</sup> Mcgrath, *supra* note 23.

<sup>102</sup> *Id.*

<sup>103</sup> U.N. Rep. of the OHCHR, Sep. 10. 2016, U.N. Doc. A/HRC/32/19 (2016), at 4.

<sup>104</sup> Human Rights Council Res., U.N. Doc. A/HRC/32/L/19 (Jun. 29, 2016).

<sup>105</sup> *Id.*

Human Rights will feature the issue of access to remedy in its 2017 report<sup>106</sup>.

Having effective grievance mechanisms is not only a testament to the willingness to achieve the goals of Pillar III, but also strengthens the protection and respect of human rights from an accountability perspective. Ensuring access to remedy through effective grievance mechanisms affirms the accountability for causing human rights abuses and a deterrence effect could potentially ensue. By confirming the rights to an effective remedy for victims, the UNGP foster this goal in Pillar III<sup>107</sup> and advocate for the improvement of this aspect also in the first two pillars. States have the primary duty to ensure access to remedy. Such duty is enshrined and articulated in various human rights treaties, and the States can fulfill it by ensuring effective grievance mechanisms and reducing potential barriers to the achievement of such goal. Second, business enterprises should provide access to effective grievance mechanisms. They should identify causes of business-related human rights abuses and be proactive in legitimate remediation<sup>108</sup>. These interconnections emphasize the importance of the right to an effective remedy.

The right to an effective remedy is “a core tenet of international human rights law”<sup>109</sup>. As a human rights obligation, the right to an effective remedy typically shares several characteristics, which are different from other obligations under the general international law regime<sup>110</sup>. Distinctions must be made between obligations under traditional international law and those under international human rights law. Generally, obligations under traditional international law arise from a

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<sup>106</sup> GLOBAL BUSINESS INITIATIVE ON HUMAN RIGHTS AND CLIFFORD CHANCE, *supra* note 100.

<sup>107</sup> Human Rights Council Res., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

<sup>108</sup> GLOBAL BUSINESS INITIATIVE ON HUMAN RIGHTS AND CLIFFORD CHANCE, *supra* note 100.

<sup>109</sup> U.N., *supra* note 103.

<sup>110</sup> Frederick Megret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 98 (Daniel Moeckli et.al. eds., 2014).



specific contract between States Parties<sup>111</sup>. In other words, they are reciprocal among State Parties and exist only to the extent that the State Parties have given their consent. From this rather politically motivated setting, State Parties are free to delimit the duty perimeter they are willing to be bound or obliged to fulfill. Also, a State Party may cease to honor its treaty-based obligation when other State Parties do not comply. However, treaty-based human rights obligations are set in a different context and share some special characteristics<sup>112</sup>. Firstly, the right-holders, as beneficiaries of human right treaties, are individuals or groups of individuals, not States<sup>113</sup>. While States formally bind themselves with international human rights obligations to other States, it is the affirmation of human rights of third-party beneficiaries within their respective jurisdiction and/or territory that in fact results from this commitment<sup>114</sup>. Secondly, reciprocity is practically invalid in international human rights obligations. As such, non-compliance of one or some of the State Parties does not automatically permit any State Party to also cease to honor their human rights obligations, as this would instead affect the individuals or groups of individuals who are the beneficiaries of the rights<sup>115</sup>. Thirdly, human rights treaties are regarded as legislative, or even constitutional<sup>116</sup>.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 99. (Professor Megret noted that the term “special characters” has already been refined by various human rights bodies to reflect the distinction of international human rights obligations from those under traditional international law.).

<sup>113</sup> Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 2000 11 European J. Int’l L., 489, 493.

<sup>114</sup> Megret, *supra* note 110, at 99.

<sup>115</sup> *Id.*; See also Reservations to the Genocide Convention, Advisory Opinion, 1951 I.C.J. 15 (May 28). (The ICJ distinguished between ordinary treaties and those with human rights characters: “[T]he contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual between rights and duties.”).

<sup>116</sup> *Loizidou v. Turkey* (Preliminary Objections), 1995 20 Eur. Ct. H.R. 99, 75. (In this case, the European Court of Human Rights described the European

Hence, the substance of international human rights obligations resembles the community norms to which all community members must adhere, rather than contract-based contents created by and only applicable to State Parties as found in other general international law instruments. Consequently, an obligation to ensure the right to effective remedy is mandatory, as a human rights obligation must always be honored and fulfilled by the State Parties of the international human rights instruments in which such right is embedded, regardless of non-compliance by other State Parties.

The right to an effective remedy is one of the most fundamental human rights. Embedded in many international human rights instruments, it imposes an obligation on State Parties to provide remedies and reparations for victims of human rights abuses and serves as an underlying platform for constructing the UNGP Pillar III. To start, the Universal Declaration of Human Rights (UDHR) Article 8 expressly declares that everyone has the right to an effective remedy<sup>117</sup>. More specifically, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Article 6 affirms that everyone within the jurisdiction of State Parties is assured of effective protection and remedies against any acts of racial discrimination<sup>118</sup>. While the term “right to an effective remedy” is the most straightforward, other core international human rights instruments employ different wording due to their application in different contexts, but retain the fundamental idea reflecting the right to an effective remedy. For instance, the International

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Convention of Human Rights as “a constitutional instrument of European public order”).

<sup>117</sup> U.D.H.R., *supra* note 35, art. 8. (Article 8, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

<sup>118</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Mar. 7, 1966, 660 U.N.T.S. 211. (Article 6, “State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination”).

Covenant on Civil and Political Rights (ICCPR) Article 14(1)<sup>119</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) Article 18(1)<sup>120</sup> use the term “a fair and public hearing”, while the Convention on the Rights of the Child (CRC) Article 37(d)<sup>121</sup> uses the term “prompt access to legal and other appropriate assistance”, and the Convention on the Rights of Persons with Disabilities (CRPD) Article 13<sup>122</sup> uses the term “effective access to justice”.

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<sup>119</sup> I.C.C.P.R., *supra* note 36, art. 14(1) (Article 14(1), “*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*”).

<sup>120</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 18(1), Dec. 18, 1990, 2220 U.N.T.S. 93. (Article 18(1), “*Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”).

<sup>121</sup> Convention on the Rights of the Child, art. 37(d), Nov. 20, 1989, 1577 U.N.T.S. 3. (Art. 37(d), “*Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*”).

<sup>122</sup> Convention on the Rights of Persons with Disabilities, art. 13, Dec. 13, 2006, 2515 U.N.T.S. 3. (Article 13, “*States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate*

Whichever term the right to effective remedy is referred as, satisfying the obligation to ensure this right requires a conceptual understanding of the human rights obligation “tripartite typology” – that is, States must respect, protect, and fulfill human rights<sup>123</sup>. Firstly, to respect, States must not take any measures that interfere with the enjoyment of human rights of persons within their respective jurisdiction and/or territory. Hence, States must not take any measures that result in creating barriers to effective remedy. Secondly, to protect, States need to take proactive measures to ensure that such persons do not suffer from human rights violation committed by third parties. Only if it can be proven that States failed or “lacked due diligence”<sup>124</sup> to prevent the violation, it would result in the breach of the States international human rights obligations. Thus, States must create an environment or adopt measures that promote the enjoyment of the right to effective remedy. Further, States must take measures to ensure that no third parties in their respective jurisdiction and/or territory, such as business enterprises, create barriers to prevent individuals or groups of individuals from enjoying their rights to effective remedy<sup>125</sup>. Finally, to fulfill, States should take positive steps to warrant a greater enjoyment of human rights. Such positive steps can range from adopting appropriate laws that incorporate States international human rights obligations into domestic laws, to training States officers to be knowledgeable or capable of preventing human rights violations<sup>126</sup>, to providing individuals with adequate food whenever they are deprived of their right to food as enshrined in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) “for reasons beyond their control”<sup>127</sup>. In addition, providing

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*accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”).*

<sup>123</sup> Megret, *supra* note 110, at 101.

<sup>124</sup> Velasquez Rodriguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172, 176 (Jul. 29, 1988).

<sup>125</sup> Megret, *supra* note 110, at 102.

<sup>126</sup> Megret, *supra* note 110, at 103.

<sup>127</sup> U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, May 12, 1999 (Aug. 11, 2016, 10:30 AM), <http://www.refworld.org/docid/4538838c11.html>.

effective remedy is a suitable example of a States' obligation to fulfill. States are required to create an accountable society where human rights violations are consistently punished whether by State-based or non-State-based grievance mechanisms. If the society is under the impression that human rights violations often go unpunished, it may trigger a lack in confidence and a breach of States' human rights obligations to fulfill<sup>128</sup>.

With the rights to effective remedy embedded in many international human rights instruments to which States Parties are obliged to adhere, implementing the UNGP Pillar III thus facilitates the greater realization of the States human rights obligations to respect, protect, and fulfill the right to effective remedy, as well as fulfilling the State duty to protect in accordance with the UNGP Pillar I. At the same time, implementing the UNGP Pillar III enables business enterprises to fulfill their responsibility to respect the right to effective remedy in accordance with the UNGP Pillar II.

### **C. DOING BUSINESS RESPONSIBLY – CREATING EFFECTIVENESS CRITERIA FOR OPERATIONAL-LEVEL GRIEVANCE MECHANISMS**

Recalling the interplay between the UNGP Pillar I and III in the previous section, States have a duty to protect human rights, which includes the right of victims to effective remedy. Essentially, ensuring access to effective remedy facilitates the realization of other rights<sup>129</sup>, such as non-discrimination and the rights of the child<sup>130</sup>. Generally, States fulfill this

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<sup>128</sup> Velasquez Rodriguez v. Honduras, *supra* note 124, ¶ 176.

<sup>129</sup> Charter of Fundamental Rights of the European Union, Dec. 12, 2000, 2000 (C 364/1), art. 47. (For instance, Article 47 provides that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal” and are entitled to legal aid “in so far as such aid is necessary to ensure effective access to justice”).

<sup>130</sup> European Agency for Fundamental Rights (FRA), *Improving access to remedy in the area of business and human rights at the EU level – Opinion of*

duty by providing remedy through State-based grievance mechanisms, which can be both judicial and non-judicial. State-based judicial grievance mechanisms are national judicial institutions, such as courts and tribunals, overseeing both civil and criminal cases, whereas State-based non-judicial grievance mechanisms can range from mediation, arbitration, and ombudsperson institutions, to those provided by National Human Rights Institutions (NHRI), such as the OECD National Contact Points (NCP), and other multi-stakeholder initiatives (MSIs) which involve States<sup>131</sup>. Both types of State-based grievance mechanisms are not mutually exclusive. In fact, they complement each other by filling gaps that could otherwise prevent effective remedy. State-based non-judicial grievance mechanisms are regarded as quicker, cheaper, and simpler than State-based judicial grievance mechanisms<sup>132</sup>. Depending on the situation, State-based non-judicial grievance mechanisms may serve as a starting point, and at a later stage the case may be taken to the judicial grievance mechanisms. Currently, the Council of Europe recommends that “Member States should provide for State-based non-judicial grievance mechanisms that meet the effectiveness criteria listed in the Principle 31 of the UNGP” and “facilitate the implementation of their decisions”<sup>133</sup>. Moreover, “bodies such as labor inspectorates, National Human Rights Institutions, and equality bodies, should be evaluated as to the ‘adequacy and availability’ in general and the remedies they afford”<sup>134</sup>.

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*the European Union Agency for Fundamental Rights* (Apr. 10, 2017), <http://fra.europa.eu/en/opinion/2017/business-human-rights>, at 19.

<sup>131</sup> GLOBAL BUSINESS INITIATIVE ON HUMAN RIGHTS AND CLIFFORD CHANCE, *supra* note 100, at 7; see also *Handbook on European law relating to access to justice, Luxembourg, Publications Office*, European Agency for Fundamental Rights (FRA) (Jan. 2016).

<sup>132</sup> *Id.*, at 54.

<sup>133</sup> COUNCIL OF EUR., *Recommendation of the Committee of Ministers to member states on human rights and business*, 1249th Meeting, CM/Rec/2016 (Mar. 2, 2016) appendix ¶ 50, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2016\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2016)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true).

<sup>134</sup> *Id.*, at ¶ 51.

However, relying solely on State-based grievance mechanisms may jeopardize the possibility of accessing remedy in an effective manner. This is because there are multiple barriers associated with State-based grievance mechanisms. For instance, in a situation where a subsidiary company of a multinational corporation violates human rights in a host State, in which the subsidiary company operates, victims typically seek redress from the subsidiary company in this host State. If this fails, victims are still unable to seek redress in the home State, where the multinational corporation (as parent corporation) is domiciled<sup>135</sup>. Under the doctrine of limited liability and separate corporate personality, parent corporations can easily escape from their liability for human rights abuses caused by their subsidiary company operating in countries with weak or ineffective legal systems<sup>136</sup>. This is because the parent corporation and the subsidiary company are, in fact, two different companies. Moreover, there are jurisdictional issues arising from cross-border claims, since the domestic court of a home State does not have jurisdiction over claims that occur in the territory of a host State, which means the claim is outside of the home State's territorial jurisdiction. Despite several attempts to recommend<sup>137</sup>, whether by being regulated by the so-called "Brussels regime" among the EU Member States<sup>138</sup>, or by invoking the doctrine of *forum non conveniens* in common law jurisdictions to give discretion to courts to grant a stay of proceedings<sup>139</sup>

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<sup>135</sup> *Id.* (The UNGP Commentary 26 also recognizes this legal barrier as it states that this legal barrier can arise where "claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim").

<sup>136</sup> Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 Wash. & Lee L. Rev. 1769 (2015).

<sup>137</sup> COUNCIL OF EUR., *supra* note 133, at ¶ 35.

<sup>138</sup> Commission Regulation No.44/2001 (recast as (EU) No.1215/2012), *the Agreement between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention, Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, O.J. L339/3.

<sup>139</sup> Christine Kaufmann, *Holding multinational corporations accountable for human rights violations: litigation outside the United States*, in BUSINESS AND

in favor of a forum where the case may be “tried more suitably for the interests of all the parties and the ends of justice”<sup>140</sup>, a practical obstacle regarding the jurisdictional barriers continues to be the potential practice of potential “forum shopping”<sup>141</sup> where multinational corporations may choose to establish their subsidiaries in countries with weak judicial systems, especially in countries outside the Brussels regime or in countries whose courts are known to be hesitant to assert jurisdiction through some available doctrines.

With several barriers associated with State-based grievance mechanisms identified, resorting to non-State-based grievance mechanisms, especially the ones at the operational level, may be more efficient and favorable in ensuring the right to effective remedy. The UNGP Pillar II is innovative in that it embeds the right to effective remedy into one of the responsibilities that business enterprises should respect. According to UNGP Principle 22, business enterprises must ensure that any adverse human rights impact they have caused or contributed to will be appropriately remediated through legitimate process<sup>142</sup>. This mirrors the UNGP’s categorization of different scenarios, for which business enterprises are expected to take responsibility. First, a business enterprise is responsible to ensure legitimate remediation when it causes adverse human rights impact, whether through its action or omission<sup>143</sup>. Second, a business enterprise has to take responsibility when it contributes to adverse human rights impact through its own activities and “as a result of its business relationship with other parties”<sup>144</sup>. Lastly and seemingly less stringently enforced, a business enterprise is required to seek to prevent or mitigate adverse human rights impact when such impact is directly linked to its operations, products or services through its business relationships<sup>145</sup>.

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HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 254 (Dorothee Baumann-Pauly, Justine Nolan eds., 1st ed. 2016).

<sup>140</sup> *Spiliada Maritime Corporation v. Cansulex* [1987] A.C. 460, 476.

<sup>141</sup> E.U. FRA, *supra* note 130, at 32.

<sup>142</sup> U.N.G.P., *supra* note 3, Principle 22, at 24-25.

<sup>143</sup> U.N.G.P., *supra* note 3, Principle 13(a), at 14-15.

<sup>144</sup> U.N.G.P., *supra* note 3, Commentary Principle 13, at 15.

<sup>145</sup> U.N.G.P., *supra* note 3, Principle 13(b), at 14-15.



By extending the scope of implementation beyond the State-nexus sphere, the UNGP creates a whole new platform for this right to be realized, as, in some situations, obtaining the cooperation of non-State entities, including business enterprises, to foster grievance mechanisms may be more appropriate, practical, and effective. As a type of non-State-based grievance mechanisms, operational-level grievance mechanisms are administered or operated by business enterprises to resolve cases concerning business-related human rights abuses and should be accessible “directly to individuals and communities”<sup>146</sup>. Alternatively, operational-level grievance mechanisms may be provided “through recourse to a mutually acceptable external expert or body”<sup>147</sup>.

The benefits of using operational-level grievance mechanisms, as highlighted in the Commentary to the UNGP, are the capability to identify adverse human rights impact as a part of business enterprises’ ongoing human rights due diligence and the competence to provide effective remedy immediately after the victims are abused.<sup>148</sup> Formulating from this view, the UNGP, therefore, provides effectiveness criteria and guidance on best practices for operational-level grievance mechanisms. The following sections discuss the effectiveness criteria defined in the UNGP, followed by some prominent barriers that prevent access to operational-grievance mechanisms.

## **1. Effectiveness criteria for operational-level grievance mechanisms**

Traditionally, providing remedy has been regarded as the fundamental role of States through their judicial systems. While the UNGP recognizes the utility of State-based judicial grievance mechanisms, it also suggests to the States to complement such mechanisms by ensuring the availability of effective non-State-based, non-judicial grievance mechanisms, including operational-level grievance mechanisms. From

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<sup>146</sup> U.N.G.P., *supra* note 3, Commentary of Principle 26, at 29.

<sup>147</sup> *Id.*

<sup>148</sup> U.N.G.P., *supra* note 3, Principle 29, at 32.

the business enterprises' point of view, resorting to an operational-level grievance mechanism for dispute resolution reduces the risk of long, ongoing litigation and negative public campaigns, where chances of successfully winning over both potential scenarios are typically rendered as too optimistic<sup>149</sup>. Hence, business enterprises are likely to be better off when they identify and address grievances early before they escalate into larger publicity damage. Initially, Professor John Ruggie in a 2008 Report to the Human Rights Council suggested that an operational-level grievance mechanism should focus on direct or mediated dialogue, which should be administered by representatives of the groups who may need to access it<sup>150</sup>. This 2008 Report further provided an initial list of effectiveness criteria for non-judicial grievance mechanisms; whereby such mechanisms should be legitimate, accessible, predictable, equitable, rights-compatible, and transparent<sup>151</sup>. A year later, Professor John Ruggie officially clarified in his 2009 Report that by suggesting that an operational-level grievance mechanism be based on dialogue and mediation, it should not be adjudicated by business enterprises<sup>152</sup>. The final list of effectiveness criteria became official when the Human Rights Council endorsed the UNGP in 2011.

To measure the effectiveness, the UNGP Principle 31 suggests that effective operational-level grievance mechanisms should be:<sup>153</sup>

- (a) *Legitimate*: enabling trust from the shareholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) *Accessible*: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) *Predictable*: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types

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<sup>149</sup> Human Rights Council Distr., U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), at 93.

<sup>150</sup> *Id.*, at 95.

<sup>151</sup> *Id.*, at 92.

<sup>152</sup> Human Rights Council Distr., U.N. Doc. A/HRC/11/13 (Apr. 22, 2009), at 99.

<sup>153</sup> U.N.G.P., *supra* note 3, Principle 31, at 33-34.

of process and outcome available and means of monitoring implementation;

- (d) *Equitable*: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) *Transparent*: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) *Rights-compatible*: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) *A source of continuous learning*: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) *Based on engagement and dialogue*: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Each criterion addresses different aspects of an operational-level grievance mechanism. First, for legitimacy, being trusted by intended users or aggrieved parties is the ultimate goal. The perception of legitimacy among intended users can be improved through trust-building and by fostering formal governance of an operational-level grievance mechanism, such as including formal procedural provisions and involving intended users in the design process<sup>154</sup>. Second, accessibility focuses on ensuring that intended users know about the operational-level grievance mechanism. Merely publicizing the existence of such mechanism is insufficient; there must be measures in place to ensure that

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<sup>154</sup> Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, in CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, (Cambridge, MA: John F Kennedy School of Government. Harvard University, 2011), at 13-15.

the intended users are well aware of its existence<sup>155</sup>. Third, predictability emphasizes the need for a clear time frame for every stage of the procedure as well as the rendering and implementation of the outcome. In principle, this requires the creation of a balance between formalization and flexibility. Occasionally, the original time frame might need to be extended to accommodate further required investigations. In this case, clear explanations should be given to all parties involved<sup>156</sup>. Fourth, equitability should ensure that aggrieved parties have reasonable access to sources of information, advice, and necessary expertise. Initially, this was a critical challenge, as business enterprises often lack resources to provide full assistance to the aggrieved parties. The use of the terms “reasonable” and “necessary” however softens the otherwise rigorous requirement and makes it more achievable for business enterprises to fulfill<sup>157</sup>. Fifth, transparency, as opposed to predictability, focuses on informing the aggrieved parties of the post-submission status of their complaint and how efficiently the operational-level grievance mechanism, to which they submitted their complaint, is performing. This principle must also take confidentiality into consideration, as it may be necessary to prevent possible retaliation against the aggrieved parties<sup>158</sup>. Sixth, the rights-compatibility principle does not imply that all grievances always amount to alleged human rights abuses. Rather, it ensures that the identification and the resolution of grievances prevent them from possibly escalating to the level of human rights abuses<sup>159</sup>. Seventh, as source for continuous learning, data received from running an operational-level grievance mechanism, such as number of reported grievances, feedbacks from users and performance tracking, will help to improve the mechanism in the future. It might even prevent potential future harms and grievances<sup>160</sup>. Lastly, an operational-level grievance mechanism should be based on dialogue and engagement. In doing so, situations, in which a business enterprise simultaneously assumes the role of judge and defendant can be prevented. Further, unilateral

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<sup>155</sup> *Id.*, at 15-17.

<sup>156</sup> *Id.*, at 18-19.

<sup>157</sup> *Id.*, at 19-21.

<sup>158</sup> *Id.*, at 22-23.

<sup>159</sup> *Id.*, at 21-22.

<sup>160</sup> *Id.*, at 26-27.

decisions made by a business enterprise and conceived as an outcome are precluded<sup>161</sup>. In any case, if an adjudication becomes necessary, it must be provided by a legitimate, independent third-party mechanism<sup>162</sup>.

In summary, the UNGP Commentary highlights three important basic features that an operational-level grievance mechanism should incorporate; it must be designed in a way that groups of people for whose use an operational-level grievance mechanism is intended are aware of its existence, have trust in it, and can use it in a practical manner<sup>163</sup>. In addition, an operational-level grievance mechanism should not replace or preclude access to other types of grievance mechanisms such as judicial and non-judicial grievance mechanisms, as well as legitimate trade union procedures in labor-related disputes<sup>164</sup>.

While all of the UNGP effectiveness criteria are, in principle, equally indispensable for building operational-level grievance mechanisms that are trustworthy, widely utilized by victims and that serve as useful references for future operational-level grievance mechanisms, examining every criterion will require a magnitude of tasks to be performed. In fact, it has been argued that “there is not a one-size-fits-all approach”<sup>165</sup> to effective operational-level grievance mechanisms. Henceforth, this research chooses to focus on the last of the three basic features – that is, the requirement that groups of people are able to use such mechanisms in a practical manner. Mirroring this feature is the Principle 31(b) on “Accessibility”.

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<sup>161</sup> *Id.*, at 24-26.

<sup>162</sup> U.N.G.P., *supra* note 3, Commentary of Principle 31, at 35.

<sup>163</sup> U.N.G.P., *supra* note 3, Commentary of Principle 31, at 34.

<sup>164</sup> Rees, *supra* note 154, at 9.

<sup>165</sup> Van Genugten *et al.*, *Company-community conflicts: the effectiveness of outcomes of non-judicial conflict resolution. An explanatory report*. Report prepared for ACCESS Facility, The Hague (2013), at 56.

## 2. Barriers to accessing operational-level grievance mechanisms

Access to operational-level grievance mechanisms may be hampered by several barriers. While the use of operational-level grievance mechanisms may circumvent certain barriers found in State-based judicial grievance mechanisms, other barriers continue to exist. The UNGP Commentary, thus, identified several barriers that might jeopardize the accessibility to operational-level grievance mechanisms. Among these are “a lack of awareness of the mechanism, language, literacy, costs, physical location and fear of reprisals”<sup>166</sup>. Furthermore, it recognized the imbalance of financial competence between business enterprises and victims – which means that the latter are often unable to obtain financial support throughout the case, thus restricting the likelihood of being able to benefit from a “fair process”<sup>167</sup>. More notably, many operational-level grievance mechanisms often suffer from a lack of trust and credibility, as they are owned and operated by business enterprises, which allegedly caused or contributed to human rights abuses involving their intended users<sup>168</sup>. In some cases, claimants to operational-level grievance mechanisms may be required to waive their rights to pursue possible future legal action against the business enterprises<sup>169</sup>. While there is currently no prohibition on legal waivers, the OHCHR believes that such legal waiver “should be as narrowly

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<sup>166</sup> U.N.G.P., *supra* note 3, Commentary of Principle 31, at 34.

<sup>167</sup> U.N.G.P., *supra* note 3, Commentary of Principle 31, at 35.

<sup>168</sup> Colleen Freeman and Esther de Haan, *Using Grievance Mechanisms: Accessibility, Predictability, Legitimacy and Workers’ Complaint Experiences in the Electronic Sector* (Amsterdam, Stichting Onderzoek Multinationale Ondernemingen SOMO: Center for Research on Multinational Corporation, 2014).

<sup>169</sup> EarthRights International, *Survivor of Rape by Barrick Gold Security Guards Offered “Business Grants” and “Training” in Exchange for Waiving Legal Rights* (Sep. 11, 2017, 1:40 PM), <https://www.earthrights.org/media/survivors-rape-barrick-gold-security-guards-offered-business-grants-and-training-exchange>.

construed as possible, and preserve the right of claimants to seek judicial recourse for any criminal claims”<sup>170</sup>.

Other documents have also identified barriers to access that can be added to the UNGP list. For instance, the Harvard Kennedy School Working Paper for Corporate Social Responsibility Initiative No. 40 titled “Grievance Mechanisms for Business and Human Rights”<sup>171</sup> identified several interesting barriers to access in connection with non-State-based grievance mechanisms. First, claimants may face certain restrictions preventing them from being parties to the operational-grievance mechanism. Such restrictions can range from requiring membership to a specific organization or initiatives ruling out third parties who are not authorized representatives<sup>172</sup>. Second, an operational-level grievance mechanism, especially one with efficient fact-finding procedures, may be too “resource intensive” and costly to operate. In practice, business enterprises may not be able to staff competent departments and dedicate human resources specifically to the handling of their operational-level grievance mechanisms. Furthermore, business enterprises with limited resources may have to create additional measures or impose barriers to limit the number of incoming case filings<sup>173</sup>.

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<sup>170</sup> U.N. OHCHR, *supra* note 24.

<sup>171</sup> Caroline Rees, *Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps*, in CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, WORKING PAPER NO. 40 (Cambridge, MA: John F Kennedy School of Government. Harvard University, 2008).

<sup>172</sup> *Id.*, at 12.

<sup>173</sup> *Id.*, at 13.

## CONCLUSION

Chapter II provided a preliminary exploration of the global standards on access to remedy prior to studying the implementation of operational-level grievance mechanisms in the context of Thailand's sugar industry. To start, *Section II.A* outlined the fundamental principles relating to business and human rights and explained the conceptual justification and development of the UNGP and the three Pillars. *Section II.B* focused mostly on Pillar II – Access to Remedy – and justified the importance of revitalizing this so-called “forgotten pillar” to promote and ensure the right to effective remedy. The research conceptualized grievance mechanisms in accordance with the UNGP Pillars structure – state duty to protect and corporate responsibility to respect. Whereas States are obliged to fulfill their duty to protect by providing remedy through state-based grievance mechanisms, both judicial and non-judicial, business enterprises may fulfill their responsibility to respect human rights by implementing operational-level grievance mechanisms in their business operation. *Section II.C* first discussed the barriers associated with State-based grievance mechanisms and suggested the use of operational-level grievance mechanisms as an alternative to circumvent such barriers. Then, the research discussed the UNGP effectiveness criteria and reiterated the scope of the study in accordance with the “accessibility” criteria. This research argued that the access to operational-level grievance mechanisms, if executed effectively, can serve to ensure the right to effective remedy for the victims, including the subcontracted agricultural workers who are the focus of this research. This Chapter concluded by exploring several potential barriers that might jeopardize the accessibility to operational-level grievance mechanisms. Further information on the UNGP accessibility criteria and identification of potential barriers will be discussed in greater detail in Chapter VI.



## CHAPTER III

# Pillar III in Context: Thailand and its Sugar Industry

Implementing the UNGP has not been an easy endeavor. Constant resistance from stakeholders, particularly from governments and business enterprises, has become a familiar feature. Some repressive or authoritarian governments may not be capable or willing to protect the fundamental human rights of the people in their jurisdiction and/or territory<sup>174</sup>. Likewise, business enterprises that disregard human rights or even cause or contribute to human rights abuses are less likely to bind themselves to any form of accountability<sup>175</sup>. In the past, numerous academic works have attempted to study the implementation of the UNGP<sup>176</sup>, and the results reveal that several private sector actors, including business enterprises<sup>177</sup>, are increasingly prepared to incorporate human rights into their everyday operations. While this willingness is unquestionably welcome news, finding ways to further increase the capacity of business enterprises to respect human rights and to provide access to remedy is undoubtedly a commendable, yet

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<sup>174</sup> Justine Nolan, *Business and Human Rights in Context*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 3 (Dorothee Baumann-Pauly, Justine Nolan eds., 1st ed. 2016).

<sup>175</sup> *Id.*

<sup>176</sup> For instance, Faracik, *supra* note 47; Maddalena Neglia, *The Implementation of the UN Guiding Principles on Business and Human Rights: Some Reflections on European and US Experiences*, Working Paper No. 2014/35, Maastricht School of Management (2014), <https://www.msm.nl/resources/uploads/2014/09/MSM-WP2014-35.pdf>.

<sup>177</sup> Faracik, *supra* note 47.

challenging task. This research intends to support the endeavor by conducting an implementation study specifically on ensuring greater accessibility to operational-level grievance mechanisms administered or operated by business enterprises. This analysis is supported by a qualitative study performed in the context of Thailand's sugar industry. To provide background information on Thailand and its sugar industry and contextualize this research as well as support further analysis, this Chapter will discuss Thailand's reaction to the UNGP, map the supply-chain of Thailand's sugar industry, identify actors, explore negative impacts on human rights in the supply-chain, and map the available grievance mechanisms including the operational-level grievance mechanisms.

## **A. THAILAND'S REACTION TO THE UNGP**

Located in Southeast Asia, the Kingdom of Thailand has areas covering 513,120 sq.km., bordering Myanmar to the West, Cambodia and Laos to the East, and Malaysia to the South. Its economy largely depends on various types of export, including agricultural products. The GDP per capita in 2016 was approximately at 16,800 USD, and its labor force at 38.45 million makes Thailand the World's 17<sup>th</sup><sup>178</sup>. Thailand is a party to all international bills of human rights and six additional international human rights instruments: International Covenant on Civil and Political Rights (ICCPR)<sup>179</sup>; International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>180</sup>; International Convention on Elimination of All Forms of Racial Discrimination (CERD)<sup>181</sup>; Convention on the Elimination of All Forms of Discrimination against Women

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<sup>178</sup> CIA World Fact Book, *Thailand* (Sep. 8, 2017, 8 AM), <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>.

<sup>179</sup> I.C.C.P.R., *supra* note 36.

<sup>180</sup> I.C.E.S.C.R., *supra* note 37.

<sup>181</sup> C.E.R.D., *supra* note 118.

(CEDAW)<sup>182</sup>; Convention on the Rights of the Child (CRC)<sup>183</sup>; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT)<sup>184</sup>; Convention on the Rights of Persons with Disabilities (CRPD)<sup>185</sup>; and International Convention for the Protection of All Persons from Enforced Disappearances (CED)<sup>186</sup>. The last core human rights treaty that Thailand has not yet signed or ratified is the Convention on the Protection of the Rights of All Migrant Workers and of their Families (CMW)<sup>187</sup>. With its dualist approach, Thailand has to implement its international human rights obligations into its domestic legislations.

The government of Thailand has had some formal responses and made reference to the protection of human rights as well as subsequently to the issue of business and human rights on various occasions. Initially, Thailand made an international pledge to voluntarily affirm human rights, and stated: “Thailand is firmly committed to the respect for human dignity, justice, compassion, non-discrimination, and a sense of mutual obligations to the fellow human beings”<sup>188</sup>. In addition, Thailand has illustrated its firm commitment to cooperate with the Human Rights Council and reaffirmed its belief that “all human rights are indivisible, interdependent and interrelated” and Thailand will continue “to promote and protect all human rights, be they civil, political, economic, social, and cultural rights, and the right to development on an equal footing”<sup>189</sup>. Thailand’s constant participation, cooperation, and report submission to the Office of the High Commissioner of Human Rights also illustrates its

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<sup>182</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>183</sup> C.R.C., *supra* note 121.

<sup>184</sup> Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, Feb. 4, 1984, 1465 U.N.T.S. 112.

<sup>185</sup> C.R.P.D., *supra* note 122.

<sup>186</sup> International Convention for the Protection of All Persons from Enforced Disappearances, 2716 U.N.T.S. 3.

<sup>187</sup> C.M.W., *supra* note 120.

<sup>188</sup> The Permanent Mission of Thailand to the United Nations, *Thailand’s Voluntary Pledges and Commitments in the field of human rights*, Letter No.56101/643 (Apr.24, 2006).

<sup>189</sup> *Id.*

commitment to the duty to protect human rights<sup>190</sup>. Currently, Thailand is in the process of developing its version of an OECD National Action Plan with specific focus on business and human rights<sup>191</sup>, and the cabinet released a Ministerial Resolutions in May 2016 to regulate Thailand's outbound investment and recommend compliance with the UNGP<sup>192</sup>.

Thailand has been gradually introducing the UNGP to the Thai public mainly through a series of research conducted by the National Human Rights Commission of Thailand (NHRC). The NHRC commissioned groups of researchers to translate the UNGP and conduct preliminary research on the implementation of the UNGP in various aspects. As of 2017, the finished analyses, all of which are available in the Thai language, are: (1) Introduction to Business and Human Rights under the UN Framework of Protect, Respect, Remedy<sup>193</sup>; (2) International Standards of Business Operation that Respect Human Rights<sup>194</sup>; (3) The Role of the National Human Rights Commission to Protect Human

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<sup>190</sup> For instance, U.N. OHCHR, *Human Rights Committee considers the Report of Thailand on Mar. 14, 2017* (Sep. 8, 2017, 8:40 AM), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21377&LangID=E>.

<sup>191</sup> U.N. OHCHR, *State national action plan* (Sep. 8, 2017, 8:50 AM), <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

<sup>192</sup> The National Human Rights Commission of Thailand, *Cabinet gives greenlight to outbound and domestic investment and must respect human rights* (Sep. 8, 2017, 9 AM), <http://www.nhrc.or.th/News/Information-News/ข่าวสารด้านมาตรการหนุนธุรกิจเอื้อสิทธิมนุษยชน.aspx>; see also Wora Suk, *Writing the Rulebook: Will Thailand Force its Businesses to Respect Human Rights?* (Sep. 8, 2017, 9 AM), <https://www.earthrights.org/blog/writing-rulebook-will-thailand-force-its-businesses-respect-human-rights>.

<sup>193</sup> The National Human Rights Commission of Thailand, *Introduction to Business and Human Rights under the UN Framework of Protect, Respect, Remedy* (Sep. 8, 2017, 9:20 AM), <http://library.nhrc.or.th/ulib/document/ebook/E08289/ebook.html#p=8>.

<sup>194</sup> The National Human Rights Commission of Thailand, *International Standards of Business Operation that Respect Human Rights* (Sep. 8, 2017, 9:20 AM), <http://library.nhrc.or.th/ulib/document/Fulltext/F09042.pdf>

Rights Violation by Private Sectors<sup>195</sup>; (4) Impact of Retail Businesses on the Protection of Human Rights<sup>196</sup>; and (5) Human Rights Due Diligence<sup>197</sup>. Furthermore, Thailand's Ministry of Justice recently hosted an academic conference entitled "the Dissemination and Implementation of the United Nations Guiding Principles on Business and Human Rights" on May 31, 2017, where Prime Minister Prayuth Chan-Ocha reaffirmed the importance of the UNGP and their correlation with the Sufficiency Economy Philosophy – a Thai development approach advocated by His Majesty the late King Bhumibol Adulyadej of Thailand. At the event, the Ministry of Justice together with 7 other entities – National Human Rights Commission, Ministry of Foreign Affairs, Ministry of Commerce, The Federation of Thai Industries, The Thai Bankers Association, The Thai Chamber of Commerce, and Global Compact Network Thailand – signed a Declaration on the Implementation of the UNGP<sup>198</sup>.

Past the celebratory introduction, the actual implementation of the UNGP will need to be executed and enforced. Until now, Thailand, as part of its duty to protect, has implemented various non-binding initiatives to encourage business enterprises to respect human rights, and has provided both judicial and non-judicial, State-based grievance mechanisms for victims of business-related adverse human rights impact to seek remedy. For instance, the Investment Promotion Act B.E. 2520 (1977) recently amended in B.E. 2560 (2017) grants special investment promotion privileges, such as exemption on imported duties, to eligible business enterprises provided that the submitted investment project

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<sup>195</sup> The National Human Rights Commission of Thailand, *The Role of the National Human Rights Commission to Protect Human Rights Violation by Private Sectors* (Sep. 8, 2017, 9:30 AM), <http://library.nhrc.or.th/ulib/document/Fulltext/F09043.pdf>.

<sup>196</sup> The National Human Rights Commission of Thailand, *Impact of Retail Businesses on the Protection of Human Rights* (Sep. 8, 2017, 9:40 AM), <http://library.nhrc.or.th/ulib/document/Fulltext/F07988.pdf>.

<sup>197</sup> The National Human Rights Commission of Thailand, *Human Rights Due Diligence* (Sep. 8, 2017, 9:45 AM), <http://library.nhrc.or.th/ulib/document/Fulltext/F09202.pdf>.

<sup>198</sup> Royal Thai Government, *MOJ and 7 entities signed a Declaration* (Sep. 8, 2017, 10:30 AM), <http://www.thaigov.go.th/news/contents/details/4175>.

contains appropriate measures to protect and monitor so as not to cause damage to the quality of the environment, for the benefit of people's livelihood and the sustainability of human and nature<sup>199</sup>. Another initiative is the Thai Labor Standard (TLS) issued by the Ministry of Labor. The current version, TLS No. 8001-2553 released in 2010, contains several guidelines on corporate social responsibility and the improvement of the quality of life of laborers<sup>200</sup>. Future initiatives are expected to be introduced, at least according to the official commitment announced at the Cabinet Meeting on 16 May 2017, when the Government approved the NHRC's proposal on serious measures and guidance to promote social responsibility and respect for human rights by business enterprises<sup>201</sup>. On seeking remedy, judicial grievance mechanisms are generally available at the Court of Justice, as well as specifically at the Labor Court. State-based, non-judicial grievance mechanisms are available at the National Human Rights Commission of Thailand (NRHC) and the Rights and Liberties Protection Department (RLPD). More details will be provided subsequently in *Section III.D* regarding "Existing grievance mechanisms in Thailand".

Notwithstanding the pledge of the Thai government to address the business and human rights-related issues reflecting the initial commitment on the State duty to protect, more topics still need to be tackled. Especially with regard to access to remedy, the study on the implementation of the UNGP effectiveness criteria for operational-level grievance mechanisms in Thailand is still in its infancy. This research, therefore, deals with this remaining gap and explores the accessibility to operational-level grievance mechanisms in a specific context – Thailand's sugar industry.

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<sup>199</sup> INVESTMENT PROMOTION ACT B.E. 2520 (1977) (amended B.E. 2560 (2017)), art. 19 (Thai.).

<sup>200</sup> MINISTERIAL ANNOUNCEMENT *Concerning the Thai Labor Standard No.8001-2553* B.E. 2553 (2010) (Thai.).

<sup>201</sup> Royal Thai Government, *supra* note 198.

## **B. STUDYING THAILAND’S SUGAR INDUSTRY**

The sugar industry is one of Thailand’s leading and most important processed agricultural products industries. Its strength emanates from the use of raw materials commonly found domestically – sugar canes. The annual production is abundant – so much so that it can support both domestic consumption and international export. Each year, the sugar industry financially supports approximately 200,000 households, generating approximately 200,000 million THB (CHF 5,800 million) annually<sup>202</sup>. Moreover, Thailand’s geographical location in the center of Asia provides logistical advantages for exporting sugar to many sugar-importing countries in the region<sup>203</sup>.

Sugar cane is harvested throughout Thailand, but many plantations are concentrated in the northeastern region. The sugar cane harvest season lasts from November to January of the following year, allowing for multi-use of the same land plot for other crops in other seasons. The researcher visited sugar cane plantations in Buriram and Khon Kaen provinces in the northeastern region to conduct structured interviews. The details of these interviews, including the methodology, questions, consent forms, and demography of interviewees, are provided in Appendices A to D respectively. In the following sub-sections, the research maps the supply chain and identifies all actors involved in the supply chain of Thailand’s sugar industry.

### **1. Mapping the supply-chain**

The Office of Cane and Sugar Board of Thailand (OCSB) provides a general illustration of the supply-chain of Thailand’s sugar industry. The OCSB categorizes the supply-chain into three stages according to terminology used by the Supply Chain Management (SCM): upstream,

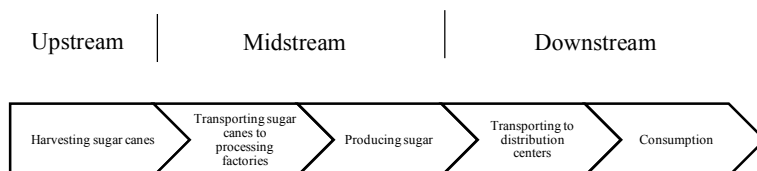
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<sup>202</sup> Food Intelligence Centre (Thailand), *Industry Overview* (Oct. 25, 2016 3:25 PM), [http://fic.nfi.or.th/foodindustry\\_ceo\\_view.php?smid=904](http://fic.nfi.or.th/foodindustry_ceo_view.php?smid=904).

<sup>203</sup> *Id.*

midstream, and downstream<sup>204</sup>. At the upstream stage, sugar cane is harvested in the plantations and then transported to local processing factories. Afterwards at the midstream stage, the sugar cane is processed to become sugar and then transported to distribution centers. Finally, at the downstream stage, consumers purchase the packages of sugar for their consumption. Figure 1 illustrates the supply-chain of Thailand's sugar industry<sup>205</sup>.

**Figure 1 -  
Supply Chain of Thailand's Sugar Industry**



In this supply-chain, agricultural workers are operating at the upstream stage. They harvest sugar canes at plantations for subcontractors. Then, the harvested sugar canes are transported to nearby processing factories or sugar mills owned by sugar producers. The entire upstream stage can be categorized into different tiers based on the commercial relationship between manufacturers (in this case, sugar producers) and subcontractors<sup>206</sup>. The Original Equipment Manufacturer (OEM) refers to a company that manufactures a final product for consumers. Tier One refers to a direct subcontractor to the OEM, and Tier Two is a direct subcontractor to the Tier One<sup>207</sup>. In this context, the OEM refers to sugar producers. Tier One refers to subcontractors, and Tier Two refers to subcontracted agricultural workers.

<sup>204</sup> Office of Cane and Sugar Board of Thailand, *Sugar Cane Supply Chain* (Oct. 25, 2016, 4:30 PM), <http://www.cms2green.com/lowsugar/carbon.php>.

<sup>205</sup> *Id.*

<sup>206</sup> Sarokin, *supra* note 15.

<sup>207</sup> *Id.*



It must be noted that the OCSB-version of the supply-chain only illustrates the overall scale of the sugar industry, from upstream to downstream. To study the supply-chain specifically at the sugar producing stage, a study of the supply-chain within the upstream and midstream stages is necessary. For this, a sugar producing supply-chain of the Mitr Phol Company, which is considered one of the biggest sugar companies in Thailand employing approximately 6,500 employees<sup>208</sup>, provides a relevant example. Illustrations of actors in different tiers of Thailand's sugar industry supply-chain and of the relationship between the different actors in Mitr Phol's supply-chain will be subsequently provided after the following subsection, in figure 2 and 3 respectively.

## 2. Identifying actors

Identifying all relevant actors of a supply-chain is an indispensable task, as it facilitates a better understanding of the overall process. In Thailand's sugar industry, there are several key actors ranging from subcontracted agricultural workers working in plantations to sugar producers with headquarters located in city centers. The interconnections between all the identified actors will be explained below, when each actor is identified. For clarity purpose, this research will identify actors using Mitr Phol's supply-chain, as most, if not all, Thai sugar producers have similar patterns in their supply-chains.

**Sugar producers** – In accordance with the UNGP term, “business enterprises”<sup>209</sup> in the context of this research are sugar producers, and this research will use the term “sugar producers” throughout to avoid confusion with other actors which may also be business enterprises *per se* (such as subcontractors). As sugar producers are the main buyers of sugar canes, the level of their influence in the sugar industry is inevitably high. In Thailand, there are four major sugar producers, whose combined

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<sup>208</sup> Interview with representatives from the Mitr Phol Group, in Bangkok.

<sup>209</sup> For instance, U.N.G.P., *supra* note 3, Principle 1, 2, and 11.

market shares comprise more than 50% of the total<sup>210</sup>. These major sugar producers, namely Mitr Phol Group, Thai Roong Ruang Group, Thai Ekalak Group (KTIS) and Tamaka Group (KSL), enter into agreements with local subcontractors to procure sugar canes. Having sourced the sugar cane supply, they produce sugar in many of their processing factories (or locally referred to as “the sugar mills”) in the region and distribute sugar to domestic consumers or export internationally. Sugar producers are the OEM in the supply-chain.

**Subcontractors** – Subcontractors can be a small group of people or a small-to-medium enterprise (SME); the latter would fall into the UNGP term of “business enterprises”. For clarity purpose, this research will use the term “subcontractors” to avoid confusion with the larger business enterprises in this context, namely “sugar producers”. Alternatively referred to by locals as “vendors”, “suppliers” or “middle persons” (a direct, literal translation from the Thai term “*por-kar-kon-klang*”), the subcontractors’ position in the supply-chain lies between sugar producers and subcontracted agricultural workers. On the one hand, they subcontract the harvest work from the sugar producers, typically by concluding a buy/purchase of sugar cane agreement with sugar producers which includes negotiated terms on various issues such as prices, volumes, and quality. Once such agreement has been concluded, the subcontractors are obliged to procure the agreed amount of sugar cane to the sugar producers. To fulfill this obligation, the subcontractors employ local subcontracted agricultural workers to perform the harvest work at their sugar cane plantations through a hire of work contract, or alternatively called “an employment contract”. The subcontracted agricultural workers are typically Thai nationals, but in some cases subcontractors also hire foreigners sourced from neighboring countries. Depending on the negotiation, subcontracted agricultural workers are obliged to harvest an agreed amount of sugar cane, or to work a specific number of hours regardless of the amount of sugar cane harvested. Normally, subcontractors come from middle-class families who own a

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<sup>210</sup> Wareerat Petchseechoung, *Thailand Industry Outlook 2016-2017: Sugar Industry* (Jul. 28, 2017, 1:30 PM), [https://www.krungsri.com/bank/getmedia/d81281c6-531f-48a0-8801-8f15c6402347/IO\\_Sugar\\_2016\\_EN.aspx](https://www.krungsri.com/bank/getmedia/d81281c6-531f-48a0-8801-8f15c6402347/IO_Sugar_2016_EN.aspx).

lot of land used for plantations and are well funded<sup>211</sup>. In application of the supply-chain terms, the subcontractors are in the Tier One of the supply-chain.

**Agents** – While most subcontractors directly subcontract the harvest work from the sugar producers, some subcontractors who have limited connections with sugar producers or are new to the industry usually resort to the use of agents. Agents are experienced subcontractors who have accumulated expertise and developed a strong network of connections with the sugar producers. Typically, agents charge a commission fee for facilitating the conclusion of the buy/purchase agreements between subcontractors and sugar producers. Alternatively, agents, who subcontracted the harvest work from sugar producers, further subcontract it to smaller subcontractors to perform the harvest work.<sup>212</sup> In this scenario, the agents thus become the first-tier subcontractors, and the smaller subcontractors become the second-tier subcontractors. Using the supply-chain term, the agents (or first-tier subcontractors) are in the Tier One, and the second-tier subcontractors are demoted to Tier Two.

**Subcontracted agricultural workers** – “Subcontracted agricultural workers” are workers who are engaged in agricultural work and are employed by subcontractors, not sugar producers. Principally, these subcontracted agricultural workers are not legally related to the sugar producers. Subcontracted agricultural workers are obliged to provide labor for harvesting sugar cane to subcontractors. They are typically sourced from villages in the area, and are often blood-related<sup>213</sup>. Additionally, they may be sourced from neighboring countries. Subcontracted agricultural workers who are non-Thai nationals generally earn less than their Thai counterparts<sup>214</sup>. As non-employees to sugar producers, sugar producers are not obliged to provide fundamental labor protection and welfare to subcontracted agricultural workers, as

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<sup>211</sup> Interview with subcontractors, in Khon Kaen and Buriram.

<sup>212</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

prescribed by relevant laws including the Labor Protection Act (the LPA) due to the lack of formal employer-employee connection. In the supply-chain, subcontracted agricultural workers are in Tier Two, or in even lower tiers, if their employers (subcontractors) are second-tier subcontractors.

In this supply-chain, the most vulnerable actors to potential adverse human rights impact are subcontracted agricultural workers. This statement resonates the purpose of the UNGP as well as their preceding documents<sup>215</sup>, whose main focus lies in the protection of human rights. Since the inception of the UNGP emphasis has been placed on protecting the rights-holders, as for example they define adverse human rights impacts as “sweatshop conditions and bonded labor in factories”, “indigenous people’s communities displaced without adequate consultation or compensation”, “seven-year-old children toiling on plantations” and so on<sup>216</sup>. Moreover, a reference to victims was clearly included in the first report developed by Professor Ruggie to the Human Rights Council, the “Protect, Respect and Remedy Framework”, as the Framework rests on three pillars and the last pillar being “the need for greater access by victims to effective remedy, both judicial and non-judicial”<sup>217</sup>. From another angle, the pre-UNGP and now the world’s largest CSR initiative – the UN Global Compact – encourages company participants to promote many causes including “socially responsible human rights and workplace standards”<sup>218</sup>.

As mentioned, this research will focus on the rights of subcontracted agricultural workers in Tier Two of this supply-chain. Considering their working conditions, subcontracted agricultural workers are more prone to a variety of mistreatments, which could potentially amount to adverse human rights impacts. On a global scale past cases of alleged adverse human rights impacts involving agricultural workers generally included

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<sup>215</sup> For instance, U.N. OHCHR, *supra* note 40.

<sup>216</sup> RUGGIE, *supra* note 39, at xv-xvi.

<sup>217</sup> RUGGIE, *supra* note 39, at xx-xxi.

<sup>218</sup> RUGGIE, *supra* note 39, at xxvii.

arbitrary land grabbing<sup>219</sup>, child labor<sup>220</sup> and forced labor<sup>221</sup>. For this research, information on the working conditions of subcontracted agricultural workers was gathered through structured interviews. The details of their working conditions will be provided in *Section III.C*. Such details, however, do not serve to allege certain actors, particularly sugar producers, of human rights violation. Whether actions or activities carried out by certain actors explained in this research amount to human rights violations is neither absolute nor definitive, and depends largely on official interpretation by relevant authorities.

Figure 2 illustrates actors of different tiers in the upstream of this supply-chain. In addition, Figure 3 provides a complete illustration of the relationship between different actors in the supply-chain of Mitr Phol Sugar Corp in *Section III.D.3*.

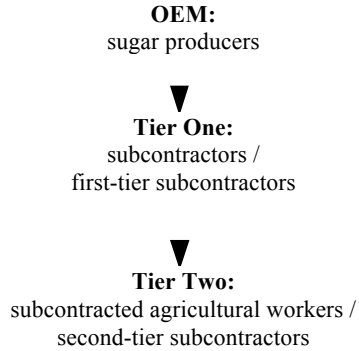
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<sup>219</sup> Kuch Naren, *Thai Representatives Meet with Koh Kong “Blood Sugar” Families*, THE CAMBODIA DAILY (Sep. 15, 2017, 8:30 AM), <https://www.cambodiadaily.com/archives/thai-representative-meets-with-koh-kong-blood-sugar-families-11884/>; see also, Maureen Harris, *Human Rights Violation in Koh Kong Sugar Plantation Confirmed by Thai Human Rights Commission*, EARTHRIGHTS INTERNATIONAL (Sep. 15, 2017, 8:40 AM), <https://www.earthrights.org/media/human-rights-violations-koh-kong-sugar-plantation-confirmed-thai-human-rights-commission>.

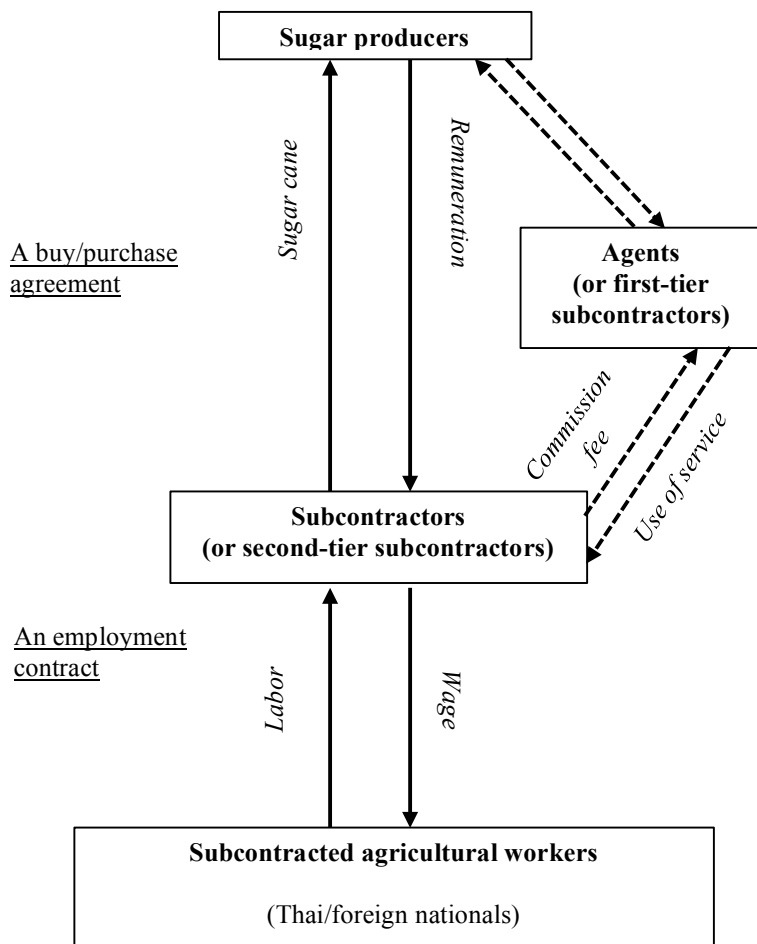
<sup>220</sup> D. C. NANJUNDA, *CHILD LABOR AND HUMAN RIGHTS: A PROSPECTIVE* 92 (2008).

<sup>221</sup> *Summary Report of the Social, Environmental and Human Rights Aspects of PepsiCo’s sugar cane supply-chain in Brazil based on Third-Party Audits* (Sep. 15, 2017, 8:50 AM), <https://www.pepsico.com/docs/album/policies-doc/pwp/pepsico-brazil-sugarcane-supply-chain-assessment.pdf?sfvrsn=0>; see also, Anni Piironen, *Forced Labor in the Global Sugar Industry*, University of Warwick (Sep. 15, 2017, 9 AM), [https://blogs.warwick.ac.uk/po901/entry/forced\\_labour\\_in/](https://blogs.warwick.ac.uk/po901/entry/forced_labour_in/).

***Figure 2 -  
Actors of Different Tiers in the Upstream of the Supply-Chain***



**Figure 3 -  
Relationship between Different Actors in the Supply-Chain of  
Thailand's Sugar Industry**



## **C. EXPLORING NEGATIVE IMPACTS IN THE SUGAR CANE SUPPLY-CHAIN**

Negative impacts encountered by subcontracted agricultural workers arising in the sugar cane supply-chain may occur in various levels of severity and forms. This section explores and reports the situation at the operational level. The research employs a structured interview method to gather information on site. The structured interviews reveal that the subcontracted agricultural workers are vulnerable to several negative impacts – some of which could potentially amount to adverse human rights impacts. In addition, the subcontracted agricultural workers currently have little recourse to remedy. In the following is the preliminary exploration of issues that the researcher encountered in the field research.

### **1. Labor-related issues**

Visits to sugar cane plantations in Buriram and Khon Kaen provided the researcher with the opportunity to gather useful first-handed information. Having interviewed subcontracted agricultural workers and subcontractors on site, several concerning issues were revealed. This section contains a narration of the relationship of two actors in the supply chain – subcontractors and subcontracted agricultural workers – as they interact at the sugar cane plantations.

When supplying sugar cane to sugar producers, ensuring the all-time availability of the product is the most important task of the subcontractors. To do so, subcontractors recruit and employ subcontracted agricultural workers to harvest sugar canes for them. In the supply-chain term, this practice is equivalent to Tier Two (subcontracted agricultural workers) supplying products to Tier One (subcontractors). Subcontracted agricultural workers are more dependent on subcontractors than the other way around<sup>222</sup>. This is because, firstly,

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<sup>222</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.



there are many locals competing to work as subcontracted agricultural workers as opposed to the more limited number of available subcontractors. In economic terms, the supply exceeds the demand for subcontracted agricultural workers. Secondly, subcontracted agricultural workers often lack fundamental knowledge of agriculture, e.g. crop harvesting, and/or the financial capability to become subcontractors themselves. Therefore, they must rely on existing subcontractors for their income-generating work opportunities<sup>223</sup>. Generally, subcontractors source subcontracted agricultural workers from the rows of villages in the nearby area and provide transportation to and from the plantations<sup>224</sup>. Since most of the subcontracted agricultural workers live within the same remote area and do not have the financial ability to afford any type of vehicle, the provided transportation becomes a necessity<sup>225</sup>.

Subcontractors regulate the subcontracted agricultural workers' working conditions. As learned in the interviews, the decision on how the wages are calculated affects these working conditions. There are currently two options: the flat rate and the quantity rate<sup>226</sup>. The flat rate (or "per day") option guarantees the amount of payment subcontracted agricultural workers receive per day. In principle, the subcontracted agricultural workers agree to work 8 hours per day, starting from 8 AM until 5 PM with a one-hour lunch break. If opting for the flat rate, the subcontracted agricultural workers receive the payment after the 8 working hours are completed, regardless of the amount of sugar cane harvested. In this payment scheme, the subcontracted agricultural workers may bring their own lunch or can have it provided by the subcontractors. This affects the amount of payment. The current flat rate for the "with-lunch" option is at 200 THB (CHF 5.50) per day, compared to 240 THB (CHF 6.50) without lunch. In contrast, the quantity rate (or "per ton") option offers the subcontracted agricultural workers more flexibility in their time management. They can define the working time that suits their personal or family requirements. For instance, one subcontracted agricultural worker indicated that she preferred to work from 4 AM to 9 AM then

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

again from 4 PM to 7 PM to avoid the mid-day heat. A different worker preferred to work from 5 PM to 8 PM, so he could also pursue another full-time job elsewhere. To meet these personal requirements, the quantity option becomes more appealing and suitable. According to the interviews, the subcontractors offer 120 THB per ton of fresh sugar cane harvested. Normally, an average subcontracted agricultural worker harvests 2 tons of sugar cane per day, so the daily income usually amounts to 240 THB (CHF 6.50) – which is equivalent to the flat rate “without-lunch” option<sup>227</sup>. Nevertheless, all of the daily wages described above are lower than the rate prescribed by law. Currently, the minimum daily wage, as declared by the Committee on Wages of the Ministry of Labor should range from 300 to 310 THB depending on the locations. In the northeastern provinces, where many sugar cane plantations are located, the legal minimum daily wage is 305 THB, and 308 THB in Khon Kaen province. This minimum rates have just become effective as of 1 January 2017<sup>228</sup>.

On some occasions subcontractors may ask the subcontracted agricultural workers to extend their working hours due to a surge in demand, when subcontractors receive more contracts to procure more sugar cane for sugar producers<sup>229</sup>. Occasionally, this means that the extended working hours exceed the maximum legal working hours of 8 hours a day and no more than 48 hours a week<sup>230</sup>. Figure 4 provides an illustration of the payment schemes.

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<sup>227</sup> *Id.*

<sup>228</sup> Comm. On Wages, Ministry of Labor, *Declaration of Minimum Wages No. 8*, [http://www.mol.go.th/sites/default/files/downloads/pdf/aihmprikaasatraakhaac\\_chaangkhamtham\\_khamchiiacchng\\_ch8.pdf](http://www.mol.go.th/sites/default/files/downloads/pdf/aihmprikaasatraakhaac_chaangkhamtham_khamchiiacchng_ch8.pdf).

<sup>229</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>230</sup> LABOR PROTECTION ACT B.E. 2541 (1998), art. 23 (Thai.).

**Figure 4 -  
The Payment Schemes of the Interviewed Subcontracted Agricultural  
Workers**

	The flat rate	The quantity rate
Number of working hours	8 hours	Flexible
Work duration	8 AM – 5 PM	Flexible
Lunch	Optional	No
Amount of daily wage	With lunch: 200 THB (CHF 5.50)  Without lunch: 240 THB (CHF 6.50)	120 THB per a ton of fresh sugar cane harvested
Transportation	Yes	Optional

In some sugar cane plantations, the presence of young subcontracted agricultural workers is a normal feature. These “junior” workers may sometimes be as young as 10 years old. These children normally accompany their parents to the sugar cane plantation and “help” do the work. The current law stipulates a legal minimum age for labor at 15 years<sup>231</sup>, whereas older workers from 15 to 18 years of age may only perform work that is not prohibited by law<sup>232</sup> and/or in locations not prohibited by law<sup>233</sup>. More details on the working conditions and the evidence of “junior” workers will be subsequently provided in *Section IV.C.1*.

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<sup>231</sup> *Id.*, art. 44.

<sup>232</sup> *Id.*, art. 49.

<sup>233</sup> *Id.*, art. 50.

## **2. Issues associated with being foreign agricultural workers**

Foreign agricultural workers, mostly arriving from the neighboring countries of Myanmar, Laos and Cambodia, are working in many sugar cane plantations in Thailand. Generally, they are not employed by sugar producers, but rather by subcontractors of the sugar producers. As a result, like Thai subcontracted agricultural workers, foreign agricultural workers have no formal employment relationship with any sugar producers. In the supply-chain, they are also in Tier Two. As foreign agricultural workers usually receive smaller wages, subcontractors tend to prefer employing them at the plantations rather than their Thai counterparts<sup>234</sup>.

Generally, a foreigner, including a foreign agricultural worker, can apply for a work permit to work in Thailand legally provided he or she meets either of the following criteria. First, he or she has a domicile in Thailand. To have a domicile in Thailand, one must seek authorization from the Immigration Commission and approval from the Minister of Interior<sup>235</sup>. Or second, he or she has been granted a Temporary Stay in Thailand for reasons not based on tourist or transit grounds<sup>236</sup>. Grounds to permit a Temporary Stay for those who hold a valid passport or other document used in lieu of passport<sup>237</sup> are diplomatic or consular mission, official duties, business, and activities under investment promotion, among others<sup>238</sup>. Having met either of the above criteria, he or she must seek approval to work at the Registrar and subsequently be issued a work permit<sup>239</sup>. Consequently, foreigners who, despite having been legally granted a Temporary Stay, perform work in Thailand without a valid work permit are considered “undocumented foreign workers”.

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<sup>234</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>235</sup> IMMIGRATION ACT B.E. 2522 (1979), art. 41 (Thai.).

<sup>236</sup> EMERGENCY DECREE CONCERNING THE MANAGEMENT OF FOREIGN LABORS B.E. 2560 (2017), art. 60 (Thai.).

<sup>237</sup> *Id.*, art. 12(1).

<sup>238</sup> *Id.*, art. 34.

<sup>239</sup> *Id.*, art. 59.

The categorization of foreign workers' legality gets more complex in the Social Security Funds (SSF) scheme. To be eligible for the SSF, a foreign worker must have been granted a Temporary Stay and a work permit. Additionally, the SSF scheme extends to foreign workers who might have entered Thailand illegally, but have passed the Nationality Verification (NV) and have been issued a temporary passport or a certificate of identity as well as a work permit<sup>240</sup>. Further, the SSF scheme extends to previously undocumented foreign workers who have already worked illegally in Thailand and have been arrested. The selected undocumented foreign workers who receive pardon by the Cabinet Resolution to continue working temporarily while awaiting deportation are entitled to the SSF on a case-by-case basis<sup>241</sup>. Figure 5 illustrates the categories of foreign workers.

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<sup>240</sup> Thai Electrical and Mechanical Contractors Association, *Social Security of Foreign Workers* (Nov. 12, 2016, 11:40 AM), [http://www.temcathai.com/download/magazine/volume\\_20\\_issue\\_4/55.pdf](http://www.temcathai.com/download/magazine/volume_20_issue_4/55.pdf).

<sup>241</sup> CABINET RESOLUTION CONCERNING THE EXTENSION OF NATIONALITY VERIFICATION AND DEFERRAL OF DEPORTATION OF FOREIGN WORKERS OF 12 JUNE B.E. 2555 (2012) (Thai.).

**Figure 5 -  
Categories of Foreign Workers**

T y p e	Criteria for applying for a work permit (*an applicant must meet either of the following criteria)		Work permit issued	Status	Eligibility to Social Security Funds
	Have domicile	Have been granted a Temporary Stay			
1	Yes	Yes	Yes	Documented	Yes
2	n/a	No (but subsequently pass the Nationality Verification and been issued temporary passport or certification of identity)	Yes	Documented	Yes
3	n/a	No	No (but pardoned by Cabinet Resolution awaiting deportation)	Considered documented	Yes
4	n/a	Can be both Yes and No	No	Undocumented	No

Generally, all documented foreign workers are entitled to the SSF<sup>242</sup>. Employers are required to register the employees at the Social Security Office within 30 days after the beginning of employment<sup>243</sup>. For every wage payment, employers must deduct 5% of the wages of the insured employees to pay to the SSF. In addition, the employers must pay contributions of the same amount (5% of the wages) to the SSF. The combined amount shall be paid to the Social Security Office on every fifteenth day of the month<sup>244</sup>. Under this scheme, the employers incur the cost for the contributions to the SSF.

<sup>242</sup> SOCIAL SECURITY ACT B.E. 2533 (1990), art. 33 (Thai.).

<sup>243</sup> *Id.*, art. 34.

<sup>244</sup> *Id.*, art. 47.

In the sugar cane supply-chain, subcontractors typically employ undocumented foreign agricultural workers due to their attractively low wages. Undocumented foreign agricultural workers often face continual frustration at the hands of their subcontractors. Being sourced from their country of origin by private parties (also called “recruiters”), they are forced to pay a “facilitating fee” to the recruiters for receiving illegal entry assistance and concluding an employment contract with the subcontractors. Upon entry into Thailand, the recruiters confiscate their passports or other forms of identification, if they possess one. They seize these documents out of fear that the undocumented foreign agricultural workers could flee and search for new jobs within a matter of days after starting their employment<sup>245</sup>. Inevitably, as the foreign agricultural workers are undocumented, they are not covered by the SSF scheme. Consequently, they receive low wages, are reportedly subjected to longer working hours, no access to the SSF, and limited opportunities to seek better jobs.

However, the use of undocumented foreign agricultural workers is becoming less attractive (as of July 2017 at the time of writing), owing largely to the strengthening of the relevant laws regulating foreign workers, including the new Emergency Decree Concerning the Management of Foreign Labors B.E. 2560 (2017)<sup>246</sup>. The new Emergency Decree imposes a hefty fine for employers who employ undocumented foreign workers (without possession of a work-permit)<sup>247</sup>. The fine ranges from 400,000 to 800,000 THB (CHF 11,350 to 22,700) per foreign worker. Undocumented foreign workers face a fine of 2,000 to 100,000 THB (CHF 60 to 2,900) if arrested. The newly imposed punishable fine rates are so high that they, almost immediately, caused a mass exodus of undocumented foreign workers fleeing Thailand as they

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<sup>245</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>246</sup> EMERGENCY DECREE, *supra* note 236.

<sup>247</sup> EMERGENCY DECREE, *supra* note 236, at 9.

cannot afford to pay the new fines<sup>248</sup>, and at the same time deterred many employers from hiring new undocumented foreign workers<sup>249</sup>.

## **D. EXISTING GRIEVANCE MECHANISMS IN THAILAND**

After the preliminary exploration on the negative impacts encountered by subcontracted agricultural workers – both Thai and foreign nationals – this section will provide a general overview of the grievance mechanisms in Thailand that are currently available to subcontracted agricultural workers. All possible types of grievance mechanisms will be addressed.

### **1. State-based, judicial grievance mechanisms**

Traditionally, the role of providing grievance mechanisms to victims of human rights abuses falls to the State. Generally, States exercise this role through their judiciary arm. Moreover, States can also allocate their judicial power to one of their administrative entities by means of decentralization. Thailand is not an exception and this sub-section provides a description of the existing State-based judicial grievance mechanism, i.e. the judiciary.

In Thailand, cases concerning general disputes not specified within the jurisdiction of specific courts, being the Constitutional Court, the Administrative Court, and the Military Court, fall within the scope of the Court of Justice. Adjudicating civil and criminal cases, there are three instances at the Court of Justice: Court of First Instance, Court of Appeal, and the Supreme Court<sup>250</sup>. Victims of human rights abuse generally

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<sup>248</sup> *Thailand's new labor rules send thousands of migrant workers fleeing* (Jul. 7, 2017, 10:30 AM), <http://www.reuters.com/article/us-thailand-migrants-idUSKBN19O0B6>.

<sup>249</sup> Interview with representatives from the Mitr Phol Group, in Bangkok.

<sup>250</sup> STATUTE OF THE COURT OF JUSTICE B.E. 2543 (2000) (Thai.), art. 2.



instigate a claim at the appropriate Court of First Instance, unless the substance of the case falls within the jurisdiction of a different specialized court<sup>251</sup>. The right to instigate a case is affirmed by the Thai Constitution<sup>252</sup> and the Civil Procedure Code<sup>253</sup>.

In the context of this research, the most relevant specialized court is the Labor Court, which oversees disputes involving labor law and practice<sup>254</sup>, such as labor disputes arising from employment contract and payment of compensation, as well as disputes concerning unfair dismissal<sup>255</sup>. Proceedings in the Labor Court contain several unique features. First, the composition of the panel of judges must include an equal number of representative(s) from each party (employer and employee), in addition to the ordinary judges<sup>256</sup>. The inclusion of representatives as members of the judging panel is based on the presumption that the representatives possess greater knowledge of the situation and can ultimately advise the ordinary judges on the issues of facts. Second, the entire proceedings at the Labor Court, from the lodging of claims to the passing of judgment, shall be exempted from relevant court fee<sup>257</sup>. This is to ease the financial burden particularly on the part of the claimants, who may be deterred from instigating claims by the financial cost if such exemption is not granted. Lastly, the proceedings may take place at the location where the injury occurs or at other places deemed appropriate, instead of being held at the Labor Court<sup>258</sup>. Furthermore, the proceedings may take place at the appropriate time, which may fall on holidays or off office-hour<sup>259</sup>. These features are

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<sup>251</sup> Pawat Satayanurug and Nattaporn Nakornin, *Courts in Thailand*, in *ASIAN COURTS IN CONTEXT* 433 (Jiunn-rong Yeh and Wen Chen Chang eds., 1st ed. 2015).

<sup>252</sup> CONSTITUTION OF THE KINGDOM OF THAILAND B.E. 2550 (2007) (Thai.), section 40.

<sup>253</sup> CIVIL PROCEDURE CODE OF THAILAND (Thai.) section 55.

<sup>254</sup> ESTABLISHMENT OF THE LABOR COURT AND ITS PROCEDURE ACT B.E. 2522 (1973) (Thai.), art. 8.

<sup>255</sup> *Id.*, art. 49.

<sup>256</sup> *Id.*, art. 17.

<sup>257</sup> *Id.*, art. 27.

<sup>258</sup> *Id.*, art. 28.

<sup>259</sup> *Id.*, art. 28.

intended to eradicate potential obstacles which may prevent effective access to judicial remedy. Nevertheless, no matter how many attractive and party-friendly features at the Labor Court may be implemented, the major prerequisite before instigating a claim at the Labor Court remains that both parties must have legal relationship through an employment contract. As a result, subcontracted agricultural workers who are not employees of sugar producers do not have a legal standing to instigate a claim at the Labor Court against the sugar producers. They are, however, still able to instigate a claim against their own employers – the subcontractors – at the Labor Court.

In addition to the judicial proceedings, the Court of Justice incorporates mediation into its proceeding<sup>260</sup> and may encourage both parties to resort to it. Alternatively, disputed parties can resort to other methods of Alternative Dispute Resolution (ADR), such as arbitration<sup>261</sup>. The Ministry of Justice established the Thai Arbitration Institute (TAI) under the Court of Justice to offer arbitration services to interested parties<sup>262</sup>. Viewed as a more business-friendly mechanism<sup>263</sup>, arbitration in Thailand can be performed both in and outside of the courts. In the in-court or “court-annexed” arbitration, parties to the court proceeding can agree to select certain technical matters to be resolved by a group of arbitrators which usually comprises specialized experts and leaves remaining legal issues to be decided by the judges in the normal court proceeding<sup>264</sup>. The court-annexed arbitration provides a timely enforcement, as parties can directly ask the judges to enforce the arbitral award without having to instigate a different claim<sup>265</sup>. The out-of-court

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<sup>260</sup> Satayanurug and Nakornin, *supra* note 251, at 435.

<sup>261</sup> Satayanurug and Nakornin, *supra* note 251, at 434.

<sup>262</sup> Satayanurug and Nakornin, *supra* note 251, at 435.

<sup>263</sup> RICHARD M. BUXBAUM, EUROPEAN ECONOMIC AND BUSINESS LAW 57 (Richard M. Buxbaum, eds., 1996).

<sup>264</sup> Satayanurug and Nakornin, *supra* note 251, at 436; see also Central Intellectual Property and International Trade Court and Institute of Developing Economies (IDE-JTRO) in Asian Law Series, *Alternative Dispute Resolution in Thailand* (Sep. 19, 2014, 10:20 AM), <http://elib.coj.go.th/Article/ADR.pdf>.

<sup>265</sup> Vichai Ariyanuntaka, *Court-annexed ADR in Thailand: a new challenge* (Sep. 19, 2014, 10:30 AM), [www.thailawforum.com/articles/adr.html](http://www.thailawforum.com/articles/adr.html).

arbitration can be performed institutionally or via the *ad hoc* approach. The TAI offers an institutional arbitration service based on the Arbitration Act B.E. 2545 (2002), which is modeled after the Model Law on International Commercial Arbitration prepared by the United Nations Commission on International Trade Law (UNCITRAL)<sup>266</sup>. While the ADR may appear to be a “friendlier” method of dispute resolution, awareness of the existence of this possibility is generally limited within the world of lawyers. Subcontracted agricultural workers typically have never heard of the term due to the insufficient dissemination of knowledge and the perceived complexity of the ADR operation. More measures need to be taken in order to promote the use of the ADR, and potential barriers to access the ADR need to be addressed. However, this issue is not within the scope of this research.

## **2. State-based, non-judicial grievance mechanisms**

In addition to the available State-based, judicial grievance mechanisms discussed in the previous sub-section, in the context of this research there are three State-based, non-judicial grievance mechanisms available as potential channels for subcontracted agricultural workers to seek remedy in Thailand: the Sugar Cane Workers Institutes and the OCSB Committee, the Rights and Liberties Protection Department, and the National Human Rights Commission of Thailand.

### ***a. The Sugar Cane Workers Institutes and the OCSB Committee***

Categorized according to the UNGP as a State-based, non-judicial grievance mechanism, the Office of the Cane and Sugar Board (OCSB) provides an existing grievance mechanism for agricultural workers

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<sup>266</sup> Thailand Arbitration Institute, *Decoding Arbitration*, in COLLECTIONS OF ARTICLES, REGULATIONS, AND INTERNATIONAL AGREEMENTS, LAWS, AND SUPREME COURT JUDGMENTS RELATING TO ARBITRATION COMMEMORATING 15 YEARS OF TAI 15 (Thailand Arbitration Institute, 2006).

through its municipal branches throughout Thailand. The OCSB is a department under the Ministry of Industry, with objectives to oversee and regulate the cane and sugar industry by ensuring fairness and good governance among all actors, including agricultural workers, business enterprises, and consumers.<sup>267</sup> At present, the OSCB has the responsibility to oversee the following entities, as illustrated in Figure 6.

**Figure 6 -  
Entities Overseen by the OCSB<sup>268</sup>**

	Type	Quantity
1.	Sugar cane worker institutes	28 *these institutes are administered by different entities
		<ul style="list-style-type: none"> <li>- 12 by the Esarn (Northern Thailand) sugar cane worker association</li> <li>- 7 by the Thailand sugar cane worker association</li> <li>- 8 by the Thailand sugar cane worker union</li> <li>- 1 by Thailand agricultural cooperatives</li> </ul>
2.	Sugar mills	52
3.	Sugar export companies	8

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<sup>267</sup> Office of Cane and Sugar Board of Thailand, *Objective of the OCSB* (Oct. 26, 2016, 2:35 PM), [http://www.ocsb.go.th/th/board\\_enactment/mission.php?id=254&SystemModuleKey=mission](http://www.ocsb.go.th/th/board_enactment/mission.php?id=254&SystemModuleKey=mission).

<sup>268</sup> Office of Cane and Sugar Board of Thailand, *Structure of the OCSB* (Oct. 26, 2016, 2:50 PM), as of May 2017, [http://www.ocsb.go.th/th/board\\_enactment/structure.php?ID=281&SystemModuleKey=structure](http://www.ocsb.go.th/th/board_enactment/structure.php?ID=281&SystemModuleKey=structure).

These 28 sugar cane worker institutes are established based on their geographical locations. Their objectives are to provide assistances to farmers in difficult situations, such as in times of drought and epidemic. Moreover, the institutes also serve as platforms for instigating initial claims relating to sugar productions, based on the Cane and Sugar Act B.E. 2527 (1984). The Act stipulates the duties of all stakeholders, including agricultural workers<sup>269</sup> and sugar mills<sup>270</sup>, and accords power to the OCSB Committee<sup>271</sup> to settle disputes<sup>272</sup>.

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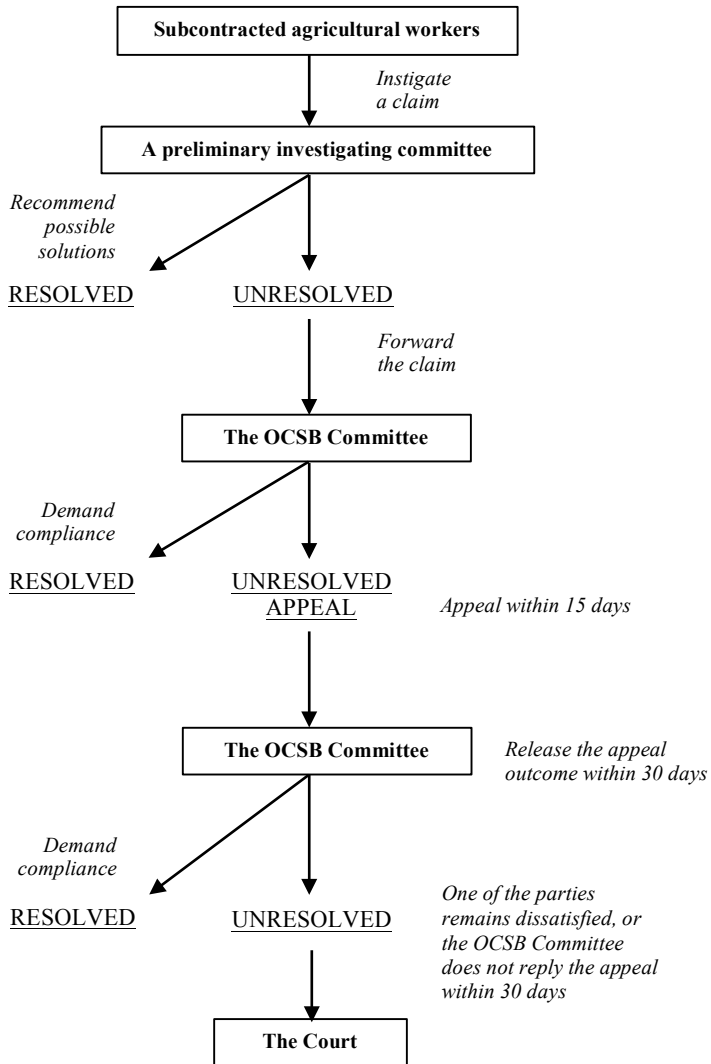
<sup>269</sup> CANE AND SUGAR ACT B.E. 2527 (1984) (Thai.) art. 36.

<sup>270</sup> *Id.*, art. 44.

<sup>271</sup> *Id.*, art. 9.

<sup>272</sup> *Id.*, art. 58.

**Figure 7 -  
Grievance Mechanism Procedures at the Sugar Cane Workers  
Institutes and the OCSB**



As illustrated in Figure 7, aggrieved subcontracted agricultural workers can instigate a claim against their employers – the subcontractors – at the sugar cane workers institute of which they are members. Instigating a claim against sugar producers is not feasible due to the lack of a formal employment relationship. After a claim is filed, a set of preliminary investigating committee members will be appointed to perform fact-finding and recommend possible solutions. If no solution can be reached, the claim will then be forwarded to the committee established by the OCSB for further investigation<sup>273</sup>. The OCSB Committee has the power to issue orders demanding compliance from the respondents within a specified period<sup>274</sup>. Should one of the parties remain dissatisfied with the order, they can appeal within 15 days from the release date of such order to the OCSB Committee, and the OCSB Committee must consider and reply to the appeal within 30 days from the date of appeal<sup>275</sup>. If such parties are still dissatisfied with the appeal outcome or the OCSB Committee does not release the appeal outcome within the required period of 30 days, the dissatisfied parties may file a claim to the Court within 15 days from the date of receiving the appeal outcome or the date when the required period has lapsed<sup>276</sup> for further proceedings.

While the proceedings at the sugar cane worker institutes and the OCSB provide a channel to resolve grievances, its effectiveness remains contested. The process is legitimate, equitable, and predictable, as its establishment and details are promulgated by law. However, other aspects of effectiveness, as recommended by the UNGP, remain problematic. For instance, transparency is questioned because the preliminary investigating committees mostly comprise representatives from owners of plantations – the subcontractors in the supply-chain<sup>277</sup>. Trust-building, therefore, remains difficult to achieve. Rights-compatibility is also not well anchored, as the law does not clearly and specifically address what would constitute a grievance. Furthermore,

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<sup>273</sup> *Id.*, art. 58.

<sup>274</sup> *Id.*, art. 58 para. 2.

<sup>275</sup> *Id.*, art. 58 para. 4.

<sup>276</sup> *Id.*, art. 58 para. 5.

<sup>277</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

accessibility is hindered because the OCSB Committee hearings normally take place centrally in Bangkok; a long-distance journey is therefore required for many claimants in cases, which elevate to the OCSB Committee<sup>278</sup>. As a result, the State-based, non-judicial grievance mechanism provided by the OCSB is not a preferable option among subcontracted agricultural workers due to lack of trust and limited accessibility<sup>279</sup>.

### ***b. The Rights and Liberties Protection Department (RLPD)***

Established in 2002 under the Ministry of Justice, the Rights and Liberties Protection Department (RLPD) serves as a specific body to address issues on inadequate human rights protection. The mission of the RLPD is “the promotion and protection of rights and liberties, in accordance with the Constitution of Kingdom of Thailand and human rights principles, through public participation, aiming for harmonization, protection and guarantee of people’s rights and liberties in line with international human rights standards”<sup>280</sup>. The RLPD has been active in carrying out initiatives based on its mission, from public education training to extending and improving its accessibility<sup>281</sup>. The RLPD, however, does not provide a grievance mechanism that has power to adjudicate claims itself. Rather, subcontracted agricultural workers can contact the RLPD and it will serve as a coordinator between aggrieved parties and the relevant official bodies. According to its most recent Annual Report published in 2016, the focus of the RLPD remains the promotion of witness protection in criminal cases with a total of 20,746 complaints received through its Service Point between 1 October 2015

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> RLPD, *Vision and Mission* (Sept. 21, 2017, 8:15 AM), <http://www.rlpd.go.th/rlpdnew/2012-06-20-05-54-34/2012-06-20-06-02-18>.

<sup>281</sup> RLPD, *Annual Report 2016* (Sept. 21, 2016, 8:30 AM), [http://www.rlpd.go.th/rlpdnew/images/rlpd\\_6/2560/59th%20Annual%20Report%20on%20the%20Protection%20of%20Rights%20and%20Freedoms..pdf](http://www.rlpd.go.th/rlpdnew/images/rlpd_6/2560/59th%20Annual%20Report%20on%20the%20Protection%20of%20Rights%20and%20Freedoms..pdf).



and 30 September 2016<sup>282</sup>. In addition, the RLPD Hot Line (Call 1111, press #77) received 18,206 calls over the same period; 4,204 of which were productive calls, whereas the 5,219 calls were left on the answering machine and 8,753 calls were nuisance calls<sup>283</sup>. The RLPD has recently initiated a proposal to combine its Hot Line with that of the National Human Rights Commission (NHRC) in order to streamline the accessibility<sup>284</sup>. This process is still on-going at the time of writing.

The State-based, non-judicial grievance mechanism provided by the RLPD is commended for its accessibility and rights-compatibility. The RLPD Hot Line is available 24/7, and the online tracking system has been installed to accommodate the claimants' requests. Also, its objective to promote and protect people's rights and liberties in line with international standards are clearly affirmed<sup>285</sup>. However, with its lack of adjudicative power and its reliance on the cooperation of relevant authorities, the predictability of the RLPD grievance mechanism cannot be fully guaranteed. As a result, the RLPD may not be the most appropriate channel for subcontracted agricultural workers to voice their grievances.

### ***c. The National Human Rights Commission of Thailand (NHRC)***

The National Human Rights Commission of Thailand (NHRC) is an independent institution created by the Constitution. The Constitution of the Kingdom of Thailand B.E. 2560 (2017) establishes<sup>286</sup> and imposes the following duties and powers on the NHRC: (1) to examine and report facts on human rights violations without delay, and to suggest suitable measures and recommendations to prevent and redress human rights

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<sup>282</sup> *Id.*, at 56.

<sup>283</sup> *Id.*, at 47.

<sup>284</sup> *Id.*, at 29.

<sup>285</sup> RLPD, *supra* note 280.

<sup>286</sup> CONSTITUTION OF THE KINGDOM OF THAILAND B.E. 2560 (2017) (Thai.), section 246.

violations including the provision of remedy to the person affected by such violation, to the relevant State agencies or private sectors; (2) to prepare an evaluation report on the human rights situation in the country and submit to the National Assembly and the Council of Ministers and to disseminate it to the public; (3) to issue recommendations on measures or guidelines for the promotion and protection of human rights to the National Assembly, the Council of Ministers and relevant State agencies, as well as on the revision of any law, rule, and regulation in order to conform with the human rights principles; (4) to explain and report facts without delay when there is an incorrect or unfair report on the human rights situation in Thailand; (5) to promote awareness of human rights in every sector in society; and (6) to have other duties and powers prescribed by law<sup>287</sup>. The role of the NHRC to provide grievance mechanism is within the scope of the first category of power.

The NHRC is a major focal point of contact for receiving complaints regarding potential human rights violations<sup>288</sup>. Information on the complaint filings is well displayed on the NHRC's website<sup>289</sup>. Eligible complainants are persons affected by human rights violations or their representatives, persons having received unfair treatment, and private human rights organizations witnessing human rights violations. Evidently, this includes subcontracted agricultural workers. Furthermore, the NHRC can instigate a claim as it sees appropriate. Channels to file complaints include the NHRC Hot Line (Call 1377 or 02-141-3978-83), registered post to the NHRC address, fax, an electronic form available on the NHRC website, email (help@nhrc.or.th), personal walk-in to the NHRC or via other private human rights organizations<sup>290</sup>. The complaint must include the names and valid addresses of affected persons, information on the alleged human rights violators, details of the alleged human rights violations, and the signature of the complainants or their representatives.

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<sup>287</sup> *Id.*, section 247.

<sup>288</sup> Pawat Satayanurug, *Thailand*, in BUSINESS AND HUMAN RIGHTS IN ASEAN – A BASELINE STUDY 414 (Human Rights Resource Center, Jakarta, 2013).

<sup>289</sup> NHRC, *How to File Complaint* (Sept. 22, 2017, 7:05 AM), <http://www.nhrc.or.th/Complaints/How-to-complaints.aspx>.

<sup>290</sup> *Id.*

Once the NHRC receives a complaint, the human rights protection coordinator department verifies the merit of the complaint and acknowledges receipt of such complaint to the complainant within 3 days from the date of receipt. The human rights protection coordinator department then submits a summary of complaint to the Secretary-General of the NHRC. A panel of primary committee then conducts a preliminary examination of the complaint. When the panel finds that the complaint requires human rights redress, it forwards the complaint to relevant sub-committees of the NHRC. The assigned sub-committee conducts another examination and submits its findings to the verification committee. The final, verified report is then submitted to the Board of the NHRC<sup>291</sup>. The Board of the NHRC then produces a report and recommends relevant State agencies or private actors to comply with its recommendations. In the event of non-compliance, the NHRC shall report directly to the Prime Minister for further actions. Despite its non-adjudicative character, the magnitude of its recommendation has an acknowledgeable impact on deterring adverse human rights impacts. The case regarding alleged land grabbing in Sakhon Nakhon province provides an illustrative example<sup>292</sup>.

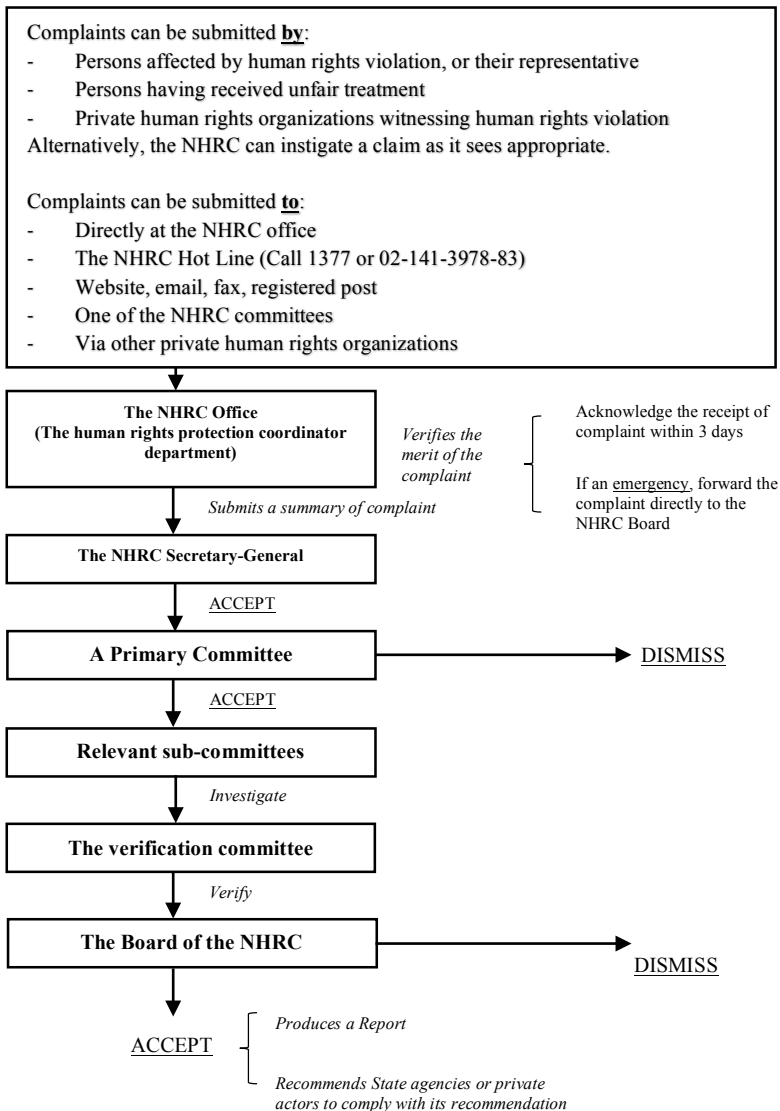
As a State-based, non-judicial grievance mechanism whose mandates are enshrined in the Constitution, the NHRC grievance mechanism is legitimate and rights-compatible. It can be accessed through multiple means, and the subsequent process is predictable. The NHRC provides a channel for tracking the progress of a claim and allows parties to gain access to sources of information, thus fulfilling the equitability and transparency criteria. Figure 8 displays the process of the NHRC grievance mechanism.

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<sup>291</sup> NHRC, *Receiving complaints procedure* (Sept. 22, 2017, 8:20 AM), <http://www.nhrc.or.th/Complaints/Duty-and-process.aspx>.

<sup>292</sup> See Section IV.C.2 “Grievance as reported by the NHRC”.

**Figure 8 -  
The Grievance Mechanism at the NHRC**



### **3. Operational-level grievance mechanisms**

Currently, the available State-based, both judicial and non-judicial, grievance mechanisms for subcontracted agricultural workers in Thailand have limitations that prevent them from being effective channels to seek remedy. Thus, operational-level grievance mechanisms could be alternative channels to find remedy, which, if executed effectively, could ultimately become preferred channels providing remediation for victims of adverse human rights impacts. However, the number of operational-level grievance mechanisms in Thailand, especially in the sugar industry, remains limited. Being non-State-based, existing mechanisms are typically driven by individual business enterprises. In other words, there is currently no industry-wide operational-level grievance mechanism to provide remedy for victims of adverse human rights impacts in any agricultural industry in Thailand. At the same time, if they exist, such operational-level grievance mechanisms are only provided at the OEM level of the supply-chain, and not in other tiers further down the supply-chain.

To date, the most-prominent, business-run grievance mechanism at the OEM level of the sugar cane supply-chain in Thailand is the procedure operated by Mitr Phol Sugar Corp. Ltd.. The researcher interviewed Mr. Boontham Wongprapinkul, Vice-President and Human Resources Department at Mitr Phol Group, to learn about the implementation of its grievance mechanism. The interview questions are provided in Appendix II. The interview showed that Mitr Phol already operates an internal system to provide an operational-level grievance mechanism to its employees.

The operational-level grievance mechanism at Mitr Phol Sugar Corp. Ltd. (the Mitr Phol mechanism) was created as a result of the company's intention to eradicate corruption and to promote transparency, fairness, and accountability for management and employees at all levels<sup>293</sup>. To start, all Mitr Phol employees can initiate a claim based on a broad spectrum of issues, such as corruption and bribery, illegitimate payments

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<sup>293</sup> SUSTAINABILITY REPORT OF 2015, MITR PHOL GROUP 18 (2015).

and dishonest conduct. Furthermore, if an employee finds that he or she does not receive “fair treatment”, or believes that his or her working condition is “unfair”, these general grounds are already sufficient for initiating a claim within the Mitr Phol mechanism. A dedicated department named the “Corporate Governance Department” (CG) is responsible for receiving and processing claims from the employees. The CG department provides the following channels through which the employees can submit a claim: a dedicated email-address through their intra-network and a complaint box for a hard copy version. Alternatively, employees can schedule an appointment with a staff member at the CG department to provide information. The CG department must reply to the complainant within the date of receipt. If the CG department finds merit in the claim and decides that further action becomes necessary, it will provide a “recommendation” to the following departments for further action: The Human Resources Management (HR) to examine potential breach or violation of company rules, and the Audit Department to examine potential acts of corruption or dishonest conduct. Responses from these departments must be returned within a specified time frame. The CG department then establishes an investigating committee, which will examine the facts, consider imposing punishment and report the findings directly to the complainant’s supervisor, HR and the CEO. Finally, the CG department reports the result of the procedure to the complainant. Follow-up checks may be made should the CG department find it necessary. Throughout the proceedings, the complainant’s identity remains anonymous until the CG department decides to take action against the relevant departments. At present, this is the only grievance mechanism that is available to the Mitr Phol employees, and it does not extend to non-employees, such as subcontractors and subcontracted agricultural workers in its supply-chain. Figure 9 illustrates the procedure.

**Figure 9 -  
The Grievance Mechanism at Mitr Phol<sup>294</sup>**

1	<p>A complainant submits a complaint form</p> <p><u>Eligible issues</u></p> <ol style="list-style-type: none"> <li>1. Corruption and bribery</li> <li>2. Illegitimate payment</li> <li>3. Unfair treatment</li> <li>4. Dishonest conduct</li> <li>5. Others</li> </ol>	<p>via mail</p> <p><b>Corporate Governance Department</b> Mitr Phol Group 2 Ploenchit Center 3<sup>rd</sup> floor Sukhumvit Klongtoei Bangkok 10110</p>	<p>via your supervisor</p>	<p>via e-mail</p> <p>cg@mitrphol.com audit@mitrphol.com</p>
2	CG replies the complainant within the date of receipt	CG receives the complaint	CG acknowledges the receipt of the complaint and replies to the complainant within the date of receipt	
3	CG considers the complaint and coordinates with relevant departments	<p><b>HR</b> Human Resources Management department examines potential breach/violation of company's rules</p>	<p><b>AUDIT</b> Audit department examines potential acts of corruption or dishonest conduct</p>	
4	Investigating committee conducts investigation, considers imposing punishment, and reports the result	Report to direct supervisor	Report to HR	Report to CEO
5	Report of result	CG reports the result to the complainant		

<sup>294</sup> *Id.*

The Mitr Phol mechanism is an example of an operational-level grievance mechanism. To determine its effectiveness, this research refers to the UNGP effectiveness criteria. The Mitr Phol mechanism attempts to ensure legitimacy, accessibility, predictability, and transparency in its system. The company's anti-corruption policy is an example of how it tries to establish trust among its employees, thus increasing the legitimacy of the Mitr Phol mechanism. Furthermore, there are multiple channels through which potential complainants can gain access to the Mitr Phol mechanism, and outlining its operational stages clearly in the company's internal communications ensures the predictability of the process. Also, the complainants can request to be informed on the progress to make the Mitr Phol mechanism more transparent.

Nevertheless, the equitability and rights-compatibility of the Mitr Phol mechanism still warrant some improvement. The complainants currently do not have access to sources of information, advice and expertise because the investigations are mostly done at the management level. Also, not all eligible grievances are specifically mentioned, as the general language of "others" used for eligible complaints issues is not a sufficient indicator of the incorporation of all internationally recognized human rights. Lastly, the Mitr Phol mechanism is currently not based on engagement and dialogue; it remains a vertical-directional operational-level grievance mechanism.

From this initial observation, the Mitr Phol mechanism currently does not fully meet all the UNGP effectiveness criteria. However, it is an illustration of a hopeful benchmark that can be further developed for other operational-level grievance mechanisms in the Thai agricultural industry. What remains to be explored is the possibility of extending the applicability of this model to allow non-employees in the supply-chain – subcontracted agricultural workers – to have effective access to the operational-level grievance mechanism.



## CONCLUSION

Chapter III was dedicated to explaining the context of this research – Thailand’s sugar industry – in preparation for further analysis in the subsequent chapters. First, *Section III.A* discussed Thailand’s reaction to the UNGP and outlined its commitment and achievements. In *Section III.B*, the supply-chain of Thailand’s sugar industry was mapped and all actors identified including the personal scope of this research – subcontracted agricultural workers. Then, *Section III.C* illustrated the negative impacts in the current supply-chain as experienced by subcontracted agricultural workers from the information obtained through a series of structured interviews. To avoid potential controversy, it must be reiterated that the information on the negative impacts as illustrated in this research does not constitute a formal allegation of human rights violations against sugar producers. In fact, the information merely served as a trigger point to evidence the necessity of enhancing access to operational-level grievance mechanisms for subcontracted agricultural workers. Lastly, *Section III.D* explored the grievance mechanisms that are currently available to subcontracted agricultural workers. The findings revealed that all types of grievance mechanisms are available to subcontracted agricultural workers in Thailand’s sugar industry: the judiciary, the state-based non-judicial grievance mechanism as administered by the OCSB, the RLPD, and the NHRC, and an example of an operational-level grievance mechanism operated by the Mitr Phol Group. While access to the judiciary and other state-based, non-judicial mechanisms is open to all subcontracted agricultural workers despite having some limitations, access to the Mitr Phol mechanism is limited only to its employees. This limitation reflected a major obstacle for subcontracted agricultural workers to access any operational-level grievance mechanisms.



## A Prerequisite to Seeking Access: Identifying Admissible Grievances

Grievance mechanisms provide victims of human rights violations with platforms for justice to be served, as they mitigate and remediate damages that have caused victims undue grievances. As such, having effective access to grievance mechanisms is a human right *per se*, and it is legally enshrined in many international human rights treaties<sup>295</sup>. While judicial grievance mechanisms, such as formal litigation, have traditionally played a major role in providing remedies, they are often regarded as “costly, lengthy, difficult, or even impossible”<sup>296</sup> to get

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<sup>295</sup> I.C.C.P.R, *supra* note 36, art. 2 (Article 2, “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”); European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222, art. 13 (Article 13, “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

<sup>296</sup> Gwynne Skinner et. al., *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business* (Jul. 7, 2017, 10:20 AM), [http://www.biicl.org/documents/182\\_the\\_third\\_pillar.pdf](http://www.biicl.org/documents/182_the_third_pillar.pdf).

access to. Hence, it has become necessary to explore other remedy options, requiring that they be more accessible and effective. This research argues that operational-level grievance mechanisms, which are administered or operated by business enterprises, fulfill such requirements. To ensure that operational-level grievance mechanisms are functional and widely utilized, they must be easily accessible for the intended users. In this research, the intended users are subcontracted agricultural workers – the non-employees of the sugar producers in the supply-chain of Thailand’s sugar industry<sup>297</sup>.

Nevertheless, the previous chapter illustrated that the existing operational-level grievance mechanism in Thailand’s sugar industry – as shown from the Mitr Phol example – still requires claimants to have an employee status, which, in effect, prevents access to the mechanism for subcontracted agricultural workers. Therefore, this research will examine possible solutions to address or circumvent this limitation.

To address this limitation, the present research argues that it is necessary at the initial stage to clearly identify on what grounds a grievance can be considered as admissible to the operational-level grievance mechanism. Having a clearly defined list of admissible grievances facilitates accessibility, as it lessens the burden of interpreting whether a grievance is admissible for every claim. Thus, the list reduces one major barrier to access – uncertainty of admissibility, as potential claimants, including subcontracted agricultural workers, will be able to utilize it as basis for submitting their claims. This chapter is dedicated to examining this issue.

Grievances occur in a variety of forms. Their magnitude can range from a minor discomfort arising from undesirable working conditions to a human rights violation based on internationally recognized human rights standards, such as the ones enshrined in the International Bill of Human Rights. In other words, human rights violations are grievances, but not every grievance is based on a human rights violation. This research, therefore, only deals with human rights violations within the context of the UNGP. The UNGP establish the responsibility of business enterprises to respect human rights and base it on internationally

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<sup>297</sup> See Section III.B.2 “Identifying actors”.

recognized human right standards, which are “understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work”<sup>298</sup>. Moreover, the UNGP advise States to encourage and monitor the corporate responsibility to respect human rights in many ways, including setting clear expectations<sup>299</sup> and enforcing laws that are aimed at or have the effect of requiring business enterprises to respect human rights<sup>300</sup>. For States to justify such compliance requirements, the UNGP’s references to internationally recognized human rights in a country-specific context must be based on the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work (hereinafter referred to as the “ILO Declaration”) as ratified or acceded by that country. Consequently, this section will explore internationally recognized human rights enshrined in the International Bill of Rights that Thailand has ratified, as well as the ILO Declaration which Thailand is committed to respect and promote by means of its membership in the ILO<sup>301</sup>. Thailand’s other international human rights obligations beyond the ones just mentioned will also be touched upon, as appropriate, in order to provide a holistic picture of all of Thailand’s obligations, despite them being outside the scope of the UNGP.

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<sup>298</sup> U.N.G.P., *supra* note 3, Principle 12, at 13-14.

<sup>299</sup> U.N.G.P., *supra* note 3, Principle 2, at 3-4.

<sup>300</sup> U.N.G.P., *supra* note 3, Principle 3, at 4-6.

<sup>301</sup> International Labor Organization (I.L.O.) Declaration on Fundamental Principles and Rights at Work and its Follow-Up, June 18, 1998 (Aug. 7, 2017, 10:55 AM), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>, preamble 2.

## A. THAILAND'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Human rights, while being “indivisible, interdependent, and interrelated”<sup>302</sup> *per se*, have become more apparent largely through their codification by the international law regime<sup>303</sup>. Moreover, those attaining the preemptory norm status become law *sans* codification<sup>304</sup>. Formally, the sources of international human rights law are listed in Article 38(1) of the Statute of the International Court of Justice (ICJ). They are international conventions, international custom, the general principles of law recognized by civilized nations, and, as subsidiary means for the determination of rules of law, judicial decisions and the teaching of the most highly qualified publicists of the various nations<sup>305</sup>. Notwithstanding the multiple sources from which international human rights law may be derived, the dominant sources today are international and regional treaties<sup>306</sup>. In the context of this research, only selected sources of internationally recognized human rights law will be examined. As mentioned, they are based on the International Bill of Human Rights and the ILO Declaration as ratified or acceded to by Thailand, pursuant to the UNGP.<sup>307</sup> The essence of the human rights enshrined in these international documents forms the basis or, in a more general term, a type of checklist to determine whether a claimed grievance is admissible before the operational-level grievance mechanism.

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<sup>302</sup> Theo van Boven, *Categories of Rights*, in INTERNATIONAL HUMAN RIGHTS LAW 143 (Daniel Moeckli et.al. eds., 2014).

<sup>303</sup> Henry J. Steiner, *International Protection of Human Rights*, in INTERNATIONAL LAW 754-755 (Malcolm D. Evans, 2<sup>nd</sup> ed. 2006).

<sup>304</sup> *Id.*

<sup>305</sup> Statute of the International Court of Justice, art. 38, Apr. 18, 1946.

<sup>306</sup> Christine Chinkin, *Sources*, in INTERNATIONAL HUMAN RIGHTS LAW 77 (Daniel Moeckli et.al. eds., 2014).

<sup>307</sup> U.N.G.P., *supra* note 3, Principle 12, at 13-14.

## 1. International Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>308</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>309</sup> and its two Optional Protocols<sup>310</sup>. The UNGP affirms this composition in its Commentary of Principle 12<sup>311</sup>. Thailand (then called “*Siam*”) has been a signatory to the UDHR since its inception in 1948, as well as a party to both the ICCPR and the ICESCR. Moreover, Thailand is also a party to six additional international human rights instruments, namely the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>312</sup>; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>313</sup>; the Convention on the Rights of the Child (CRC)<sup>314</sup>; the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT)<sup>315</sup>; the Convention on the Rights of Persons with Disabilities (CRPD)<sup>316</sup>; and the International Convention for the Protection of All Persons from Enforced Disappearances (CED)<sup>317</sup>. The remaining core human rights treaty that Thailand has yet to sign or ratify is the Convention on the Protection of the Rights of All Migrant Workers and of their Families (CMW)<sup>318</sup>.

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<sup>308</sup> I.C.E.S.C.R., *supra* note 37.

<sup>309</sup> I.C.C.P.R., *supra* note 36.

<sup>310</sup> U.N. OHCHR, *Fact Sheet No.2 (Rev. 1) The International Bill of Human Rights* (Sept. 26, 2017, 10:55 AM), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

<sup>311</sup> U.N.G.P., *supra* note 3, Commentary Principle 12, at 14.

<sup>312</sup> C.E.R.D., *supra* note 118.

<sup>313</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>314</sup> C.R.C., *supra* note 121.

<sup>315</sup> Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, Feb. 4, 1984, 1465 U.N.T.S. 112.

<sup>316</sup> C.R.P.D., *supra* note 122.

<sup>317</sup> International Convention for the Protection of All Persons from Enforced Disappearances, 2716 U.N.T.S. 3.

<sup>318</sup> C.M.W., *supra* note 120.

Sugar producers, as business enterprises in the context of this research, primarily have the responsibility to respect the internationally recognized human rights enshrined in the International Bill of Human Rights. The respect of the human rights enshrined in other international instruments to which Thailand is a party is encouraged, but not required by the UNGP. At the same time, subcontracted agricultural workers should be entitled to seek remedy for violations of human rights based on the International Bill of Human Rights. The following subsections will highlight major internationally recognized human rights that might be violated with regard to subcontracted agricultural workers and would constitute admissible grievances within the context of the UNGP.

### ***a. The right to equality and non-discrimination***

The first article of the UDHR, which states, “all human beings are born free and equal in dignity and rights”<sup>319</sup>, expresses the foundational importance of the right to equality and non-discrimination. This right is also guaranteed in other international and regional human rights instruments<sup>320</sup>. The crux of this right is the list of prohibited grounds of distinction. In the absence of straightforward and exhaustive list, the determination of what grounds of distinction shall be prohibited depends largely on the morality and political views of each determiner<sup>321</sup>. However, there is at least a consensus of what prohibited grounds of distinction are. Regarded as *autonomous norms*, the following grounds of distinction shall be prohibited: race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These grounds are embedded in the International Bill of Human Rights (the UDHR<sup>322</sup> and the ICCPR<sup>323</sup>). The right to equality and non-

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<sup>319</sup> U.D.H.R., *supra* note 35, art. 1.

<sup>320</sup> U.D.H.R., *supra* note 35, art. 1, 2(1), and 7; I.C.C.P.R., *supra* note 36, art. 2, 3, and 26; I.C.E.S.C.R., *supra* note 37, art. 2(2) and 3; ASEAN Human Rights Declaration, Nov. 9, 2012, art. 1, 2, 3 and 9.

<sup>321</sup> Daniel Moeckli, *Equality and Non-Discrimination*, in INTERNATIONAL HUMAN RIGHTS LAW 163 (Daniel Moeckli et.al. eds., 2014).

<sup>322</sup> U.D.H.R., *supra* note 35, art. 7.

<sup>323</sup> I.C.C.P.R., *supra* note 36, art. 26.



discrimination requires that no one shall be treated “less favorably than” the other person “in comparable circumstances”,<sup>324</sup> based on one or more prohibited grounds. Consequently, subcontracted agricultural workers who encounter inequality and discrimination based on the grounds listed above and as a result of their work in the supply-chain are entitled to seek remedy. At the same time, sugar producers have the responsibility to respect the right to equality and non-discrimination based on the grounds provided above.

In addition, sugar producers are encouraged to respect the right to equality and non-discrimination based on additional grounds prescribed in other international human rights instruments to which Thailand is a party. For instance, The CEDAW specifically addresses the issue of any form of discrimination against women irrespective of their marital status<sup>325</sup>. Other prohibited grounds of distinction include disability (CRPD)<sup>326</sup> and sexual orientation and gender identity (CRC)<sup>327</sup>. Extending the scope of the right to equality and non-discrimination that sugar producers are expected to respect beyond those under the International Bill of Human Rights provides subcontracted agricultural workers with more legal grounds to seek remedy.

### ***b. The right to life***

Respect for human dignity forms the basis and is connected to other more specific human rights, such as the right of a person to life, which is inherent, equal, and inalienable<sup>328</sup>. It is the foundational principle of human rights enshrined in the preambles of the International Bill of Human Rights, as well as in various other international human rights

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<sup>324</sup> Moeckli, *supra* note 321, at 164.

<sup>325</sup> C.E.D.A.W., *supra* note 182, art. 1.

<sup>326</sup> C.R.P.D., *supra* note 122, art. 2, 3, and 4.

<sup>327</sup> C.R.C., *supra* note 121; see also International Human Rights Instruments Vol II, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol II) (May 27, 2008), General Comment 4 at 410.

<sup>328</sup> I.C.C.P.R., *supra* note 36, Preamble.

instruments<sup>329</sup>. Everyone “has the right to life, liberty and security of person”<sup>330</sup>, and this right is considered “the supreme human right”<sup>331</sup> and the “fountain from which all human rights spring”<sup>332</sup>. Furthermore, the use of the wording “inherent right to life”<sup>333</sup> suggests that the right to life attains a status of customary international law<sup>334</sup>. While in practice, the right to life is often associated with issues of protection against the death penalty and against the killings by security forces<sup>335</sup>, the general requirement of the right to life remains that “no one shall be arbitrarily deprived of life”<sup>336</sup>. Therefore, none of the actors in the supply-chain may arbitrarily deprive subcontracted agricultural workers of their right to life, and sugar producers have the responsibility to respect the right to life of the subcontracted agricultural workers in their supply-chain.

### ***c. The right to be free from torture and inhuman treatment***

Similar to the right to life, the right to be free from torture and inhuman treatment is founded on the notion of respect for human dignity. The basic prohibition found in the International Bill of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”<sup>337</sup>, and this right is guaranteed in

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<sup>329</sup> For instance, in U.D.H.R., *supra* note 35; I.C.C.P.R., *supra* note 36; I.C.E.S.C.R., *supra* note 37.

<sup>330</sup> U.D.H.R., *supra* note 35, art. 3.

<sup>331</sup> International Human Rights Instruments Vol I, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol I) (May 27, 2008), General Comment 6 at 176.

<sup>332</sup> Rep. of the UN Special Rapporteur on Summary and Arbitrary Executions, U.N. ESCOR, 39<sup>th</sup> Sess., U.N. Doc. E/CN.4/1983/16 (Jan. 31, 1983), para 22.

<sup>333</sup> I.C.C.P.R., *supra* note 36, art. 6(1).

<sup>334</sup> Nigel S. Rodley, *Integrity of the Person*, in INTERNATIONAL HUMAN RIGHTS LAW 185 (Daniel Moeckli et.al. eds., 2014).

<sup>335</sup> *Id.*, at 185-188.

<sup>336</sup> I.C.C.P.R., *supra* note 36, art. 6(1).

<sup>337</sup> U.D.H.R., *supra* note 35, art. 5.

other human rights treaties to which Thailand is a party<sup>338</sup>. Determining whether an action amounts to torture, instead of merely an inhuman treatment, is a complex task. Typically, what distinguishes “torture” from “inhuman treatment” is the element of severity of pain and suffering<sup>339</sup>. However, such distinction may not be necessary in this context, as the act of inhuman treatment already suffices to warrant protection for subcontracted agricultural workers. Furthermore, it must be pointed out that reference of the right to be free from torture and inhuman treatment in the context of this research must be made only to the more general prohibition stated in the ICCPR<sup>340</sup>, as the definition of torture provided by the CAT requires the involvement of public official<sup>341</sup>. Therefore, subcontracted agricultural workers must not be subjected to any form of inhuman treatment and, if applicable, torture, while sugar producers must also respect the right to be free from torture and inhuman treatment, as provided in the International Bill of Human Rights.

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<sup>338</sup> I.C.C.P.R., *supra* note 36, art. 7 and 10; C.A.T., *supra* note 184.

<sup>339</sup> Rome Statute of the International Criminal Court, July 17, 1988, art. 7 (Elements of Crimes) and arts. 8(2)(a)(ii)-1 and 8(2)(c)(i)-4; see also U.N., *supra* note 334, at 179.

<sup>340</sup> I.C.C.P.R., *supra* note 36, art. 7.

<sup>341</sup> C.A.T., *supra* note 184, art. 1(1) (Article 1(1), “*For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*”).

## 2. The ILO Declaration on Fundamental Principles and Rights at Work

Specifically mentioned in the UNGP, the ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 at the 86<sup>th</sup> ILO Conference. The ILO Declaration clearly states that certain principles and rights are universal, and all Member States are committed to promote such principles and rights regardless of the level of economic development<sup>342</sup>. Such principles and rights are namely (1) the elimination of all forms of forced or compulsory labor, (2) the effective abolition of child labor, (3) the elimination of discrimination in respect of employment and occupation, and (4) the freedom of association and the effective recognition of the right to collective bargaining,<sup>343</sup>. By this effect, the UNGP impose such principles and rights to be respected on business enterprises<sup>344</sup>. In the context of this research, thus sugar producers must respect the four principles and rights mentioned in the ILO Declaration, while subcontracted agricultural workers are entitled to seek remedy based on such principles and rights.

Details of the four principles and rights are provided in the specific ILO Conventions. As of 2017, Thailand is a party to 5 ILO Conventions dealing with three of the four principles and rights stated in the ILO Declaration – (1) on the elimination of all forms of forced or compulsory labor, the Forced Labor Convention (C029)<sup>345</sup> and the Abolition of Forced Labor Convention (C105)<sup>346</sup>; (2) on the effective abolition of child labor, the Worst Forms of Child Labor Convention (C182)<sup>347</sup> and

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<sup>342</sup> I.L.O., *Declaration on Fundamental Principles and Rights at Work* (Sept. 27, 2017, 9:40 AM), <http://www.ilo.org/declaration/lang--en/index.htm>.

<sup>343</sup> *Id.*, Principle 2.

<sup>344</sup> U.N.G.P., *supra* note 3, Principle 12, at 13-14.

<sup>345</sup> I.L.O. Convention, Forced Labor Convention (No. 29), June 28, 1930, 39 U.N.T.S. 55, in force for Thailand on Feb. 26, 1969.

<sup>346</sup> I.L.O. Convention, Abolition of Forced Labor Convention (No. 105), June 25, 1957, 320 U.N.T.S. 291, in force for Thailand on 2 Dec 1969.

<sup>347</sup> I.L.O. Convention, Worst Forms of Child Labor Convention (No. 182), June 17, 1999, 2133 U.N.T.S. 161, in force for Thailand on Feb. 16, 2001.

the Minimum Age Convention (C138)<sup>348</sup>; and (3) on the elimination of discrimination in respect of employment and occupation, the Equal Remuneration Convention (C100)<sup>349</sup>. From 13 June 2018, the Discrimination (Employment and Occupation) Convention (C111)<sup>350</sup> will enter into force in Thailand. Obligations under other ILO Conventions to which Thailand is a party, namely the Employment Policy Convention (C122)<sup>351</sup>, the Weekly Rest (Industry) Convention (C014)<sup>352</sup>, the Equality of Treatment (Accident Compensation) Convention (C019)<sup>353</sup>, the Final Articles Revision Convention (C080)<sup>354</sup>, the Employment Service Convention (C088)<sup>355</sup>, the Abolition of Penal Sanctions (Indigenous Workers) Convention (C104)<sup>356</sup>, the Final Articles Revision Convention (C116)<sup>357</sup>, the Maximum Weight Convention (C127)<sup>358</sup>, the Vocational Rehabilitation and Employment

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<sup>348</sup> I.L.O. Convention, Minimum Age Convention (No. 138), June 26, 1973, 1015 U.N.T.S. 297, in force for Thailand on May 11, 2004.

<sup>349</sup> I.L.O. Convention, Equal Remuneration Convention (No. 100), June 29, 1951, 165 U.N.T.S. 303, in force for Thailand on Feb. 8, 1999.

<sup>350</sup> I.L.O. Convention, Discrimination (Employment and Occupation) Convention (No. 111), June 25, 1958, 362 U.N.T.S. 31, not yet in force for Thailand.

<sup>351</sup> I.L.O. Convention, Employment Policy Convention (No. 122), Jul. 9, 1964, 569 U.N.T.S. 66, in force for Thailand on Feb. 26, 1969.

<sup>352</sup> I.L.O. Convention, Weekly Rest (Industry) Convention (No. 14), Nov. 17, 1921, 38 U.N.T.S. 187, in force for Thailand on Apr. 5, 1968.

<sup>353</sup> I.L.O. Convention, Equality of Treatment (Accident Compensation) Convention (No. 19), June 5, 1925, 38 U.N.T.S. 229, in force for Thailand on Apr. 5, 1968.

<sup>354</sup> I.L.O. Convention, Final Articles Revision Convention (No. 80), Oct. 9, 1946, 38 U.N.T.S. 3, in force for Thailand on Dec. 5, 1947.

<sup>355</sup> I.L.O. Convention, Employment Service Convention (No. 88), Jul. 9, 1948, 70 U.N.T.S. 85, in force for Thailand on Feb. 26, 1969.

<sup>356</sup> I.L.O. Convention, Abolition of Penal Sanctions (Indigenous Workers) Convention (No. 104), June 21, 1955, 305 U.N.T.S. 265, in force for Thailand on Jul. 29, 1964.

<sup>357</sup> I.L.O. Convention, Final Articles Revision Convention (No. 116), June 26, 1961, 423 U.N.T.S. 11, in force for Thailand on Sep. 24, 1962.

<sup>358</sup> I.L.O. Convention, Maximum Weight Convention (No.127), June 28, 1967, 721 U.N.T.S. 39, in force for Thailand on Feb. 26, 1969.

(Disabled Persons) Convention (C159)<sup>359</sup>, the Maritime Labor Convention (MLC2006)<sup>360</sup>, and the Promotional Framework for Occupational Safety and Health Convention (C187)<sup>361</sup>, may be useful for subcontracted agricultural workers to form a basis for their claims in Thailand, but these obligations are outside of scope of the UNGP.

***a. Elimination of all forms of forced or compulsory labor***

Sugar producers should avoid causing or contributing to, or should seek to prevent or mitigate impacts caused by all forms of forced or compulsory labor. Likewise, subcontracted agricultural workers should not be subjected to all forms of forced or compulsory labor. The elimination of all forms of forced or compulsory labor evolves from one of the most fundamental human rights – the freedom from slavery. Enshrined in the ICCPR, slavery is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”<sup>362</sup>. The practice of slavery is still prevalent in certain parts of the world, where people are debt-bonded to their “masters”<sup>363</sup>. However, “forced or compulsory labor” differs from slavery due to the absence of ownership, so the ILO State Parties created a new instrument specifically addressing this alarming problem.

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<sup>359</sup> I.L.O. Convention, Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), June 20, 1983, 1401 U.N.T.S. 235, in force for Thailand on Oct. 11, 2007.

<sup>360</sup> I.L.O. Convention, Maritime Labor Convention (MLC2006), Feb. 23, 2006, I-51299, in force for Thailand on June 7, 2016.

<sup>361</sup> I.L.O. Convention, Promotional Framework for Occupational Safety and Health Convention (No. 187), June 15, 2006, 2564 U.N.T.S. 4, in force for Thailand on Mar. 23, 2016.

<sup>362</sup> I.C.C.P.R., *supra* note 36, art. 8(1).

<sup>363</sup> Fons Coomans, *Education and Work*, in INTERNATIONAL HUMAN RIGHTS LAW 253 (Daniel Moeckli et.al. eds., 2014); see also Anti-Slavery, Forced Labor (Jul. 12, 2017, 9:30 AM), <https://www.antislavery.org/slavery-today/forced-labour/>.

While the ILO Declaration accords the universal applicability of the elimination of all forms of forced or compulsory labor, details of what constitutes “forced or compulsory labor” are provided in the C029. In C029, “forced or compulsory labor” means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”<sup>364</sup>, with the exception of work or services performed pursuant to compulsory military service, normal civic obligations of citizens, a conviction in a court of law, requests in cases of emergency<sup>365</sup>. Permitted forced labor shall not be imposed for the benefit of private individuals, companies, or associations<sup>366</sup>, and only adult able-bodied males who are of an apparent age of not less than 18 and not more than 45 years may be called upon for permitted forced or compulsory labor<sup>367</sup>. In addition, C105 prohibits State Parties from utilizing permitted force or compulsory labor as a means of political coercion, mobilizing economic development, labor discipline, punishment for having participated in strikes, and of racial, social, national or religious discrimination<sup>368</sup>. Consequently, subject to the exceptions prescribed by C029 and C105, no subcontracted agricultural workers shall be subjected to any forms of forced or compulsory labor in the sugar cane supply-chain.

### ***b. Abolition of child labor***

Sugar producers should ensure that there is no practice of child labor in their supply-chain. Supplementing the details for the effective abolition of child labor enshrined in the ILO Declaration, the C182 defines the practices of child labor that are considered “the worst forms”. According to the C182, the worst forms of child labors comprise all forms of slavery or practices similar to slavery, such as children trafficking and forced or compulsory child labor; the use of a child for prostitution or

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<sup>364</sup> I.L.O. Convention, *supra* note 345, art. 2(1).

<sup>365</sup> I.L.O. Convention, *supra* note 345, art. 2(2).

<sup>366</sup> I.L.O. Convention, *supra* note 345, art. 4(1).

<sup>367</sup> I.L.O. Convention, *supra* note 345, art. 11.

<sup>368</sup> I.L.O. Convention, *supra* note 346, art. 1.

pornography-related activities; the use of a child for illicit activities such as drug trafficking; and other work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children<sup>369</sup>. While the C182 sets the age of eighteen as the benchmark for eligibility to being considered a child, Thailand specifies a minimum age of fifteen years as part of its declaration relating to the ratification of the C138<sup>370</sup>. To this effect, the minimum age of fifteen years is applicable for the following branches of economic activities: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers<sup>371</sup>. As the sugar cane supply-chain is undoubtedly a form of “agricultural undertaking mainly producing for commercial purposes”, there should not be any laborer under the age of fifteen years performing any type of work in sugar cane plantations.

### *c. Elimination of work-related discrimination*

As an overarching principle<sup>372</sup> and core right<sup>373</sup>, subcontracted agricultural workers shall not be subjected to discrimination of any form in respect of their employment and occupation. One of the most prevalent issues relating to non-discrimination is the obligation to ensure equal remuneration. The ILO Declaration and C100<sup>374</sup> share a similar objective as the ICESCR; that equal remuneration must be ensured “for work of equal value without distinction of any kind, in particular women being

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<sup>369</sup> I.L.O. Convention, *supra* note 347, art. 3.

<sup>370</sup> I.L.O. Convention, *supra* note 347, art. 2.

<sup>371</sup> I.L.O. Convention, *supra* note 347, art. 5.

<sup>372</sup> Moeckli, *supra* note 321, at 164.

<sup>373</sup> International Labor Organization (I.L.O.) Declaration on Fundamental Principles and Rights at Work and its Follow-Up, June 18, 1998 (Aug. 7, 2017, 10:55 AM), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>, preamble 2.

<sup>374</sup> I.L.O. Convention, *supra* note 349, art. 2.



guaranteed conditions of work not inferior to those enjoyed by men<sup>375</sup>. Equal remuneration for work of equal value, which includes ordinary, basic or minimum wage or salary and any additional emoluments<sup>376</sup>, for work of equal value refers to rates of remuneration established without discrimination based on sex<sup>377</sup>. Furthermore, C019 obliges State Parties to ensure the equality of treatment between their nationals and foreign workers and their dependents in relation to workmen's compensation for accidents<sup>378</sup>. In addition, from 13 June 2018, the C111 will enter into force in Thailand. The C111 obliges State Parties to eliminate any discrimination pursuant to the equality of opportunity principle in respect of employment and occupation<sup>379</sup>. Mirroring the prohibited grounds of distinction in other core international human rights treaties<sup>380</sup>, the C111 lists the following prohibited grounds of distinction which have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation: race, color, sex, religion, political opinion, national extraction or social origin<sup>381</sup>. Consequently, subcontracted agricultural workers must be treated equally and without any form of discrimination in respect of their employment and occupation, with emphasis being placed on discrimination based on sex and nationality.

## **B. HUMAN RIGHTS PROTECTION IN THAILAND'S NATIONAL LEGISLATIONS**

References to internationally recognized human rights as admissible grievances to the operational-level grievance mechanism can be made not only pursuant to the International Bill of Human Rights and the ILO Declaration as stated by the UNGP, but also in relation to domestic laws.

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<sup>375</sup> I.C.C.P.R., *supra* note 36, art. 7(a)(i).

<sup>376</sup> I.C.C.P.R., *supra* note 36, art. 1(a).

<sup>377</sup> I.C.C.P.R., *supra* note 36, art. 1(b).

<sup>378</sup> I.L.O. Convention, *supra* note 353, art. 1.

<sup>379</sup> I.L.O. Convention, *supra* note 350, art. 2.

<sup>380</sup> See Section IV.A.1 "International Bill of Human Rights".

<sup>381</sup> I.L.O. Convention, *supra* note 350, art. 1(a).

The relationship between international human rights obligations and domestic laws depends on the approach adopted by each State: monism or dualism. For monist States, international human rights obligations and domestic laws operate within the same single legal system, where international human rights obligations prevail over domestic laws<sup>382</sup>. Thailand, however, adopts the dualism theory. Under the dualism theory, there are two separate legal systems – international and domestic. International law governs relations and obligations among “independent and theoretically equal sovereign States”, whereas domestic law governs domestic affairs within a sovereign State. To apply a specific rule of international law at the national level, this rule must be transformed into national legislation following appropriate procedure. To use a rule within a domestic judicial grievance mechanism, a national judge will refer to the rule of national legislation, not the rule of international law<sup>383</sup>.

International human rights obligations are no exception. They must be transformed into Thai national legislation before being applied nationally by domestic judges. The procedure for transforming international law into national legislation is provided by the Constitution of the Kingdom of Thailand B.E. 2560 (2017) (hereinafter referred to as “The Constitution”)<sup>384</sup>. Section 178 of the Constitution accords the power to conclude treaties with other countries and international organizations to be within the prerogative of the King<sup>385</sup>. However, the transformation process is traditionally executed by the Government, subject to the King’s approval. The Constitution lists certain conditions, under which the ratification by the Parliament is mandatory. Thus a treaty that meets one of the four conditions required by the current Constitution must be ratified by the Parliament: first, a treaty containing provision(s) that would result in a change of the Thai territory or extraterritorial area over which Thailand is competent to exercise sovereignty in virtue of another treaty or international law; second, a treaty whose implementation requires the passing of an Act; third, a treaty containing provision(s) that

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<sup>382</sup> Eileen Denza, *The Relationship between International and National Law*, in INTERNATIONAL LAW 428 ((Malcolm D. Evans, 2<sup>nd</sup> ed. 2006).

<sup>383</sup> *Id.*, at 429.

<sup>384</sup> CONSTITUTION, *supra* note 286.

<sup>385</sup> CONSTITUTION, *supra* note 286, section 178.

would extensively impact the national economic or social security; and fourth, a treaty containing provisions that would considerably bind the national trade or investment<sup>386</sup>. In practice, transforming Thailand's international human rights obligations into national legislations has generally been a smooth endeavor, as the provisions in the treaties do not meet any conditions required by the enforcing Constitution at the time<sup>387</sup>. In fact, many existing domestic laws already mirrored the contents of the provisions in the treaties, apart from the ones in the CED. The integration of the CED requires a ratification by the Parliament, as its contents necessitate many changes in the domestic laws and ultimately require the passing of new Acts<sup>388</sup>.

Section 178 of the Constitution serves as a procedural medium for transforming Thailand's international human rights obligations into Thailand's national legislations. Cases brought before Thai courts, as well as before other non-judicial grievance mechanisms, can then refer to available human rights-related national legislation as their legal basis. The following subsections will provide a general mapping of Thailand's domestic law relating to human rights and labor protection.

## **1. Affirmation of rights and liberty under the Constitution of the Kingdom of Thailand**

In addition to serving as a procedural medium for transforming Thailand's international human rights obligations into Thailand's national legislations, the Constitution is a source of human rights obligations through its own affirmation of human rights. Notwithstanding the frequent repeals and/or revision of Thailand's past

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<sup>386</sup> CONSTITUTION, *supra* note 286, section 178.

<sup>387</sup> CONSTITUTION OF THE KINGDOM OF THAILAND B.E. 2540 (1997), section 224; CONSTITUTION OF THE KINGDOM OF THAILAND B.E. 2550 (2007) (Thai.), section 190.

<sup>388</sup> VITIT MUNTARBHORN, *THE CORE HUMAN RIGHTS AND THAILAND: A STUDY IN HONOR OF THE FACULTY OF LAW CHULALONGKORN UNIVERSITY* 8 (Martinus Nijhoff 2016).

Constitutions, the provisions relating to the rights of the Thai people remained largely unchanged. Provisions relating to fundamental human rights and work-related rights are enshrined in Chapter III of the Constitution entitled “Rights and Liberty of Thai People”.

The Constitution affirms that “a person shall enjoy the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws, and shall be protected by the Constitution, insofar as the exercise of such rights or liberties does not affect or endanger the security of the State or public order or good moral, and does not violate the rights or liberties of other persons”<sup>389</sup>. The Constitution also affirms the principle of equality and non-discrimination before the law with evident emphasis on gender equality<sup>390</sup>, the right to life and liberty<sup>391</sup>, and the prohibition of forced or compulsory labor<sup>392</sup>.

## **2. Laws relating to labor protection**

Thailand has an extensive list of legal provisions relating to labor protection; many of which reflect the obligations in the international human rights instruments to which Thailand is a party. This subsection provides a thematic list of Thailand’s domestic law relating to labor protection.

### ***a. General duties of employers and employees***

The Civil and Commercial Code of Thailand (the CCC) contains provisions stipulating duties of both employers and employees. Generally, an employer must pay remuneration to an employee for the duration of the employment<sup>393</sup>, provide a certificate after completion of

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<sup>389</sup> CONSTITUTION, *supra* note 286, section 25.

<sup>390</sup> CONSTITUTION, *supra* note 286, section 27.

<sup>391</sup> CONSTITUTION, *supra* note 286, section 28.

<sup>392</sup> CONSTITUTION, *supra* note 286, section 30.

<sup>393</sup> CIVIL AND COMMERCIAL CODE OF THAILAND, section 575.

the employment upon the employee's request<sup>394</sup>, and pay the cost of the return journey for an employee provided that the employer previously brought the employee to work from elsewhere at the expense of the employer<sup>395</sup>. In return, the employee must render services to the employer<sup>396</sup>, not be absent from work for an unreasonably long period<sup>397</sup> or without reasonable grounds<sup>398</sup>, not willfully disobey or habitually neglect the lawful command of the employer<sup>399</sup>, and not commit gross misconduct or other acts in a manner incompatible with the due and faithful discharge of his or her duty<sup>400</sup>.

### ***b. Equal treatment and non-discrimination based on gender***

The Labor Protection Act (LPA) contains several provisions that prohibit discrimination. First, an employer must treat both male and female employees equally unless such equal treatment is not possible due to the nature of the work<sup>401</sup>. Second, for work of equal value, quality, and quantity, an employer must prescribe wage, overtime pay, holiday pay, and holiday overtime pay equally without any gender discrimination<sup>402</sup>.

### ***c. Prohibition of sexual abuse***

An employer, a chief, a supervisor, or a work inspector shall be prohibited from committing sexual abuse, harassment, or sexual

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<sup>394</sup> *Id.*, section 576.

<sup>395</sup> *Id.*, section 586.

<sup>396</sup> *Id.*, section 575

<sup>397</sup> *Id.*, section 579

<sup>398</sup> *Id.*, section 583

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> LABOR PROTECTION ACT, *supra* note 230, art. 15.

<sup>402</sup> LABOR PROTECTION ACT, *supra* note 230, art. 53.

nuisance against an employee<sup>403</sup>. This provision previously protected only female and child employees, but it has been revised following calls to extend protection to male employees by virtue of gender equality.

#### ***d. Regulating general working conditions***

The LPA requires an employer to clearly notify normal working hours to an employee, specifying the beginning and end of each working day. The working hours shall not exceed eight hours per day and forty-eight hours per week<sup>404</sup>. For work that may cause harm to the health and safety of an employee, such as working in mines or relating to the production of hazardous chemicals, the maximum working hours must not exceed seven hours per day<sup>405</sup>. A minimum rest period of one hour must be provided for an employee after he or she has worked up to five consecutive hours<sup>406</sup>. For overtime work of more than two hours, a minimum break of twenty minutes must be granted before commencing such overtime work<sup>407</sup>. An employer must provide a weekly holiday of not less than one day per week<sup>408</sup>, and guarantee no less than thirteen traditional holidays including the National Labor Day<sup>409</sup>, grant no less than six working days as annual holidays for an employee who has worked for an uninterrupted period of one year<sup>410</sup>, and allow for an unlimited number of sick leave although the presentation of a medical certificate may be required from an employee for sick leave of more than three consecutive days<sup>411</sup>. An employer must receive prior consent from an employee before asking him or her to perform overtime work<sup>412</sup>,

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<sup>403</sup> LABOR PROTECTION ACT, *supra* note 230, art. 16.

<sup>404</sup> LABOR PROTECTION ACT, *supra* note 230, art. 23; see also MINISTERIAL REGULATION VOL. 2 B.E. 2541 (1998), art. 1 (Thai.).

<sup>405</sup> MINISTERIAL REGULATION VOL.2 B.E. 2541 (1998), art. 2 (Thai.).

<sup>406</sup> LABOR PROTECTION ACT, *supra* note 230, art. 27.

<sup>407</sup> LABOR PROTECTION ACT, *supra* note 230, art. 27.

<sup>408</sup> LABOR PROTECTION ACT, *supra* note 230, art. 28.

<sup>409</sup> LABOR PROTECTION ACT, *supra* note 230, art. 29.

<sup>410</sup> LABOR PROTECTION ACT, *supra* note 230, art. 30.

<sup>411</sup> LABOR PROTECTION ACT, *supra* note 230, art. 32.

<sup>412</sup> LABOR PROTECTION ACT, *supra* note 230, art. 24.

unless, by nature of the work it must be performed continuously and the stoppage will cause damage to the work or it is an emergency, in which case the employer may require the employee to work overtime as necessary<sup>413</sup>. At any rate, the working hours for overtime work must not exceed thirty-six hours per week<sup>414</sup>.

***e. Provision of occupational safety, health, and environment***

Provision of occupational safety, health, and environment is stipulated in the Occupational Safety, Health and Environment Act B.E. 2554 (2011). Generally, an employer must provide safe and hygienic working conditions and environment for employees in his or her establishment, as well as promoting such conditions and environment that prevent employees from harm to life, physique, mentality, or health<sup>415</sup>. Moreover, an employer must also provide officers, personnel, or a working unit in charge of safety<sup>416</sup>. When working conditions or environment may pose harm to life, physique, mentality, or health of employees, the employer is obliged to inform the employees of such potential danger, to distribute a work manual to them prior to commencing work in such conditions or environment<sup>417</sup>, and to post warning symbols or other signage that concern occupational safety, health, and environment as well as rights and duties of both the employer and the employees at the establishment<sup>418</sup>. The employer must also provide the employees with standard personal protective equipment and maintain such equipment in good, working condition<sup>419</sup>.

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<sup>413</sup> LABOR PROTECTION ACT, *supra* note 230, art. 24.

<sup>414</sup> MINISTERIAL REGULATION, *supra* note 405, art. 3.

<sup>415</sup> OCCUPATIONAL SAFETY, HEALTH AND ENVIRONMENT ACT B.E. 2554 (2011), art. 6 (Thai.).

<sup>416</sup> *Id.*, art. 13.

<sup>417</sup> *Id.*, art. 14.

<sup>418</sup> *Id.*, art. 17.

<sup>419</sup> *Id.*, art. 22.

The obligations under the Occupational Safety, Health and Environment Act resonate the obligations under several ILO Conventions to which Thailand is a party. For instance, the C187, which employs the term “the right to safe and healthy working environment”<sup>420</sup>, obliges State Parties to continuously improve occupational safety and health to prevent occupational injuries, diseases and deaths<sup>421</sup>, through their national policy<sup>422</sup> and periodically reviewed national system<sup>423</sup>. Also, the C127 obliges State Parties to ensure that no worker shall be required or permitted to engage in the manual transport of a load which, due to its weight, is likely to jeopardize his or her health or safety<sup>424</sup>. These obligations have been transformed into provisions in a series of Ministerial Regulations Concerning the Management of Occupational Safety, Health and Environment<sup>425</sup>.

#### ***f. Guarantee of daily minimum wages***

As a general rule, an employer must pay wages to an employee for his or her services<sup>426</sup>. The payment must be made in the Thai currency (THB) unless agreed otherwise<sup>427</sup>. Normally, the LPA does not specify the general minimum daily wage, as it is under the authority of the Committee on Wages at the Ministry of Labor to declare and/or update the minimum daily wage tailored to different types of work and working locations. The most-recent Declaration of Minimum Wages (No. 8) provides for a general minimum daily wage between 300 and 310 THB depending on working locations: 310 THB for Bangkok Metropolitan Area, its perimeter provinces, and Phuket; 308 THB for large provinces

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<sup>420</sup> I.L.O. Convention, *supra* note 361, art. 3 (2).

<sup>421</sup> I.L.O. Convention, *supra* note 361, art. 2(1).

<sup>422</sup> I.L.O. Convention, *supra* note 361, art. 3(1).

<sup>423</sup> I.L.O. Convention, *supra* note 361, art. 4.

<sup>424</sup> I.L.O. Convention, *supra* note 358, art. 3.

<sup>425</sup> For instance, MINISTERIAL REGULATIONS Concerning the Management of Occupational Safety, Health and Environment on Construction Work B.E. 2551 (2008) (Thai.).

<sup>426</sup> CIVIL AND COMMERCIAL CODE, *supra* note 393, section 576.

<sup>427</sup> LABOR PROTECTION ACT, *supra* note 230, art. 54.



such as Chiang Mai and Khon Kaen; 305 THB for most provinces including those in the northeastern region; and 300 THB for the eight smallest provinces mainly in the south region<sup>428</sup>. These rates have just become effective as of 1 January 2017. Minimum daily wages for specified types of skilled work may be higher than the ones prescribed generally, and the Committee on Wages declares these minimum wages separately. For instance, a welder of high-density polyethylene receives a minimum daily wage of 460 THB, whereas an aroma therapist (rank 2) receives 715 THB<sup>429</sup>.

### ***g. Provision of welfare***

The provision of welfare facilitates the realization of economic and social rights. Authorized by the LPA<sup>430</sup>, the Ministry of Labor issues the Ministerial Regulations Concerning the Provision of Welfare at a Place of Business B.E. 2548 (2005) detailing the requirements for employers to provide welfare to their employees. First, an employer must provide an adequate number of clean-water stations at the ratio of one station per forty employees, as well as sufficient number of toilets, which must be separated for both genders and must also accommodate employees with disabilities<sup>431</sup>. Second, depending on the size of the operation, an employer must provide a first-aid station, a small clinic, or a hospital equipped with basic medical facilities and personnel<sup>432</sup>. Alternatively, subject to authorization by the Director of the Welfare and Labor Protection Department, an employer may conclude agreements with hospitals, which have 24-hour operations, to send employees for medical

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<sup>428</sup> Comm. On Wages, Ministry of Labor, *supra* note 228.

<sup>429</sup> Comm. On Wages, Ministry of Labor, *Declaration of Minimum Wages for Skilled Work No. 4*, [http://www.mol.go.th/sites/default/files/downloads/pdf/Wage\\_standard4\\_for22May2014.pdf](http://www.mol.go.th/sites/default/files/downloads/pdf/Wage_standard4_for22May2014.pdf).

<sup>430</sup> LABOR PROTECTION ACT, *supra* note 230, art. 95.

<sup>431</sup> MINISTERIAL REGULATIONS *Concerning the Provision of Welfare at a Place of Business* B.E. 2548 (2005), art. 1 (Thai.).

<sup>432</sup> *Id.*, art. 2.

treatment, instead of operating its own medical facility<sup>433</sup>. The provision of additional welfare that is not legally required is encouraged, as it would contribute to a more pleasant work atmosphere.

#### ***h. Prohibition of unfair dismissal***

An employer may terminate the employment relationship with an employee and is required by law to pay indemnity to the employee<sup>434</sup> unless the law foresees the grounds for termination without indemnity payment. Examples of permitted grounds include circumstances where the employee commits a criminal offence against the employer, willfully causes damage to the employer, violates the lawful work rules, or is absent from duty for three consecutive days without justifiable reasons<sup>435</sup>. In reality, an employer may still be able to terminate employment with an employee at will, even without such permitted grounds. However, an arbitrary termination may have a great, unexpected financial and social impact on an employee, and it is considered abusive in certain jurisdictions<sup>436</sup>. This practice is widely referred to as “unfair dismissal” and is prohibited. The LPA does not provide any definitions as to what constitutes an “unfair dismissal”, but the Establishment of the Labor Court and its Procedure Act B.E. 2522 (1973)<sup>437</sup> gives discretionary power to the Labor Court to determine what action may be considered an “unfair dismissal”. For instance, terminating employment with some employees without discrimination due to a severe operational loss is not considered an “unfair dismissal”<sup>438</sup>, whereas terminating employment with some employees due to a small

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<sup>433</sup> *Id.*, art. 3.

<sup>434</sup> LABOR PROTECTION ACT, *supra* note 230, art. 118 para 2.

<sup>435</sup> LABOR PROTECTION ACT, *supra* note 230, art. 119.

<sup>436</sup> OBLIGATIONENRECHT [OR] [SWISS CODE OF OBLIGATIONS] Mar. 30, 1911, SR 220, art. 336 (Switz.).

<sup>437</sup> ESTABLISHMENT OF THE LABOR COURT AND ITS PROCEDURE ACT, *supra* note 254, art. 49.

<sup>438</sup> Dika [Supreme Court] 2003, 4753-4760/2546 (Thai.).

operational loss, which does not affect the survivability of the firm, is an “unfair dismissal”<sup>439</sup>.

### *i. Special protection for women and children*

The protection of women and children in the LPA reflects Thailand’s international human rights obligations primarily under the CEDAW and the CRC. For example, the LPA prohibits an employer from engaging women to perform specific types of work, such as working in mines and tunnels<sup>440</sup>. The permitted maximum weight a female employee may lift is limited to 25 kilograms, compared to 55 kilograms for a male employee<sup>441</sup>. Special protections are also given to pregnant employees, such as prohibition from working overtime or on holidays<sup>442</sup>, granting of maternity leave of no more than ninety days for each pregnancy<sup>443</sup>, and prohibition of dismissal due to pregnancy<sup>444</sup>. With regard to children, the LPA prohibits the employment of a child who is under fifteen years of age<sup>445</sup>, mirroring Thailand’s international human rights obligations under the C138<sup>446</sup>. A child who is between fifteen and eighteen years old shall not be employed to perform prohibited work, such as metal pressing and blowing as well as work involving heat, cold, vibration, or hazardous chemical substances<sup>447</sup>. The permitted maximum weight for a male child is 25 kilograms, and 20 kilograms for a female child<sup>448</sup>. The LPA also

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<sup>439</sup> Dika [Supreme Court] 2004, 1850/2547 (Thai.).

<sup>440</sup> LABOR PROTECTION ACT, *supra* note 230, art. 38.

<sup>441</sup> MINISTERIAL REGULATIONS Concerning the Permissible Maximum Weight B.E. 2547 (2004) (Thai.).

<sup>442</sup> LABOR PROTECTION ACT, *supra* note 230, art. 39/1.

<sup>443</sup> LABOR PROTECTION ACT, *supra* note 230, art. 41.

<sup>444</sup> LABOR PROTECTION ACT, *supra* note 230, art. 43.

<sup>445</sup> LABOR PROTECTION ACT, *supra* note 230, art. 44.

<sup>446</sup> I.L.O. Convention, *supra* note 348, art. 2.

<sup>447</sup> LABOR PROTECTION ACT, *supra* note 230, art. 49.

<sup>448</sup> MINISTERIAL REGULATIONS, *supra* note 441.

grants other protections for a child employee by regulating working hours<sup>449</sup>, prohibited place of work<sup>450</sup>, and educational leave<sup>451</sup>.

## **C. GRIEVANCES IN THAILAND’S SUGAR INDUSTRY CONTEXT**

In addition to identifying admissible grievances based on legal sources, this research will also explore grievances as encountered and identified by interviewed subcontracted agricultural workers, as well as grievances that are reported by the NHRC. The objective is to illustrate the typicality of certain grievances that subcontracted agricultural workers usually encounter, which could assist the administrators and/or operators of operational-level grievance mechanisms to pay closer attention to such grievances and consider them as admissible to their mechanism. However, to avoid controversy and as a disclaimer, this research affirms that all accounts herein, whether gathered from structured interviews or reported by the NHRC, merely serve as narrations. This research does not, by any means, attempt to allege or conclude that such accounts constitute human rights violations in relation to the UNGP. Determination of whether such accounts amount to human rights violations will need to be further decided by the available grievance mechanisms.

### **1. Grievances as identified by the interviewed subcontracted agricultural workers and subcontractors**

The researcher conducted structured interviews of subcontracted agricultural workers at sugar cane plantations and subcontractors at sugar mills in Buriram and Khon Kaen provinces in the northeast of Thailand

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<sup>449</sup> LABOR PROTECTION ACT, *supra* note 230, art. 47.

<sup>450</sup> LABOR PROTECTION ACT, *supra* note 230, art. 50.

<sup>451</sup> LABOR PROTECTION ACT, *supra* note 230, art. 52.

during 22-26 August 2016. The researcher was led to the sugar cane plantations by subcontractors. However, to ensure the anonymity of responses given by the subcontracted agricultural workers, the subcontractors (as the employers of the interviewees), agreed to remain outside of the interview area at the sugar cane plantation. Due to language barriers, as most of the interviewees were unable to speak the standard (central) Thai dialect, the researcher asked Mr. Pormest Wongsatitporn (LL.M., Chulalongkorn) to serve as a translator from Northeastern (Esarn) local dialect into standard (central) Thai throughout all interviews. The structured interviews of subcontracted agricultural workers proceeded in three stages: preliminary, group, and individual. At the preliminary stage, the researcher informed and provided the interviewees with the following details: 1) full title of the project, 2) name and position of the researcher, 3) consent form, and 4) information sheet containing a brief object and purpose of the research and background information. The consent forms were distributed in English together with the Thai translation. The interviewees were asked to sign the English form. The details of the consent form are provided in Appendix C. Also, to assist the interviewees, Mr. Wongsatitporn read out the information sheet in the local dialect to the interviewees and confirmed their understanding. The interviewees indicated that their responses and their contribution to this research shall remain anonymous. At the second stage, the interviewees were collectively asked the preliminary questions. Then at the third stage, the researcher separated the interviewees and conducted the interviews individually. Each interviewee was asked the same series of questions, which were prepared prior to the interview. The structured interview questions are provided in Appendix B. During the third stage, the interviewees who had finished being interviewed were asked to remain separated from and not to share interview-related questions with other interviewees who had yet to be interviewed. Also, the subcontractors were asked not to ask the interviewees about the responses given during the interview. The structured interviews of subcontractors, however, deviated slightly from those of subcontracted agricultural workers. Due to the small number of subcontractors and limited time, the researcher combined the second and third stage. The prepared questions were used as guidelines, and follow-up questions were asked. The table illustrating the structured interview methodology is provided in Appendix A. In the following are the

accounts given by the interviewees during the interview. Categorically, there are three issues that raise concerns.

### *a. Income below daily minimum wage*

Throughout the interviews, subcontracted agricultural workers stated that they earned a daily wage of approximately between 200 THB and 240 THB, depending on the rate (lunch or without lunch) they chose<sup>452</sup>. The subcontractors gave similar responses, as well as describing the relationship between the subcontractors and the sugar producers<sup>453</sup>.

In the supply-chain, the subcontractors and the sugar producers conclude a buy/purchase of sugar cane agreement whereby the subcontractors are obliged to provide sugar cane to the sugar producers. Terms and conditions in the contract include prices, volumes, and quality. The subcontractors indicated that such terms and conditions generally were only loosely defined at the time of conclusion of contract. This gives sugar producers a wide range of discretion at the time of delivery. For instance, changes are constantly requested with regard to the acceptable weight and size of sugar canes. Also, some mills apply their subjective “quality” standards. Mostly, if not always, the subcontractors are not made aware of these changes prior to delivery, and it is challenging for them to anticipate what will be called for<sup>454</sup>. By failing to deliver the sugar canes that meet the ever-changing quality criteria, the subcontractors are pressured to accept the reduced prices, resulting in their earning less profit<sup>455</sup>.

After the harvest, sugar canes are normally transported to the sugar mills by truck. Transporting a large amount of sugar canes from the plantations to the mills can be burdensome, as this usually requires a strong fleet of

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<sup>452</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

efficient vehicles. For some subcontractors with weaker financial ability, opting to use the mill-provided vehicles is a necessary and inevitable requirement. One of the interviewed subcontractors indicated that a transportation fee was levied on her, and the amount constantly fluctuated<sup>456</sup>. According to the interviewee, some sugar mills justify the extra charges by citing high oil prices, additional overtime payments for truck drivers, and, in some cases, some extra “contributions” requested by the highway police<sup>457</sup>. The sugar mills then forward these additional transportation costs to be absorbed by the subcontractors.

Information gathered from the interviews reveals plausible factors causing or contributing to the daily wages being lower than that prescribed by law. As mentioned, the minimum daily wage is prescribed by the Committee of Wages at the Ministry of Labor. Absent of any applicable specific rate<sup>458</sup>, the normal minimum daily wage applies to agricultural workers in general. Therefore, the interviewed subcontracted agricultural workers in the provinces of Khon Kaen and Buriram are entitled to the minimum daily wage of at least 308 THB and 305 THB respectively<sup>459</sup>. One of these plausible factors is the necessity of the subcontractors to remain profitable in their operations or to prevent further losses resulting from the additional financial burden imposed by the sugar producers. Examples of such additional financial burdens identified from the interviews are the reduction of sugar cane prices upon delivery due to inconsistent acceptance criteria of sugar canes and the transportation fees, if the subcontractors opt to use the mill-provided trucks. The subcontractors then also forward these additional burdens to be absorbed by the subcontracted agricultural workers through the reduction of their daily wage in order to maintain profitability or prevent further losses.

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<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> Comm. On Wages, Ministry of Labor, *supra* note 429.

<sup>459</sup> Comm. On Wages, Ministry of Labor, *supra* note 228.

***b. “Mandatory” cooperation for extended working hours***

In the interviews, some subcontracted agricultural workers indicated that they worked approximately eight hours a day, from 8 AM to 5 PM with a one-hour lunch break. Other subcontracted agricultural workers who opted for the quantity rate were more flexible in timing, but the overall working hours normally did not exceed the eight-hour maximum restriction. However, there are occasions when the subcontracted agricultural workers are “asked” to work for a longer period exceeding the restriction<sup>460</sup>. The extension typically results in two to three working hours more than the permitted daily working hours; however, no overtime payment is paid. When the extended working hours are required, the subcontracted agricultural workers indicated that the subcontractors normally approach them and “kindly asked” if they could work “a little bit longer”<sup>461</sup>. Generally, they cooperate because they do not want to “upset” the subcontractors<sup>462</sup>.

The subcontractors justified the extension of working hours by citing the occasional surge in demand for sugar canes<sup>463</sup>. When the subcontractors are requested to provide more sugar canes to the sugar producers within a tight timeframe, they generally agree to the request to maintain an amicable relationship with the sugar producers, even though their normal operational capability may not accommodate the increase of sugar cane orders<sup>464</sup>.

Extending the working hours beyond the maximum daily restriction is a violation of the Labor Protection Act. As already mentioned, the LPA limits the maximum working hours to eight hours per day and forty-eight

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<sup>460</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*



hours per week<sup>465</sup>. Nevertheless, plausible factors that cause the practice of extended working hours without overtime payment are the surge in demand for sugar canes and the non-confrontational culture of the Thai subcontracted agricultural workers. The “not wanting to upset” the subcontractors reflects the imbalance of the bargaining power between the subcontractors and the subcontracted agricultural workers, whereby the latter is in the inferior position due to the dire need to earn an income<sup>466</sup>. Therefore, while the cooperation may be perceived as voluntary, the decision process of the subcontracted agricultural workers is contaminated with the “kind” request to the degree that such cooperation, in fact, becomes “mandatory”.

### *c. “Voluntary” child labor*

The interviews further revealed that the age of agricultural workers can range from early teenage years up to men and women in their seventies. The omission of the term “subcontracted” in this section is due to the legal minimum age of employment, where no one under the age of fifteen can be employed. In other words, agricultural workers who are under the age of fifteen cannot legally be “subcontracted”. For the interviewed agricultural workers, there is neither a retirement restriction, nor is there a minimum age for young farmers. While the customary age-range for agricultural workers is between 20 and 60, some young agricultural workers can be as young as 10 years old<sup>467</sup>. According to the interviews, some young agricultural workers work at the plantation before and after school. Often accompanying their parents with flexible working hours (the quantity option), these young agricultural workers may start working from as early as 4 AM until just before 8 AM when the school starts. Then after school, they proceed to the plantation at around 4 PM and finish their work for the day along with their parents. As stated in the

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<sup>465</sup> LABOR PROTECTION ACT, *supra* note 230, art. 23; see also MINISTERIAL REGULATION, *supra* note 405, art. 1.

<sup>466</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>467</sup> *Id.*

interviews, the young agricultural workers principally receive the same amount of payment as their adult counterparts, but whether they actually have access to the money remains unclear. Customarily, parents take the liberty to manage their children's monetary property<sup>468</sup>.

The interviewees provided some interesting accounts as to why they chose to work at the sugar cane plantations. First, some young agricultural workers offer to work primarily out of family gratitude. The family value of being grateful is extensively nurtured in Thai society. Young members of the family, including those who are considered juvenile, are expected to provide help to their guardians. In the families of agricultural workers, this expectation inevitably includes providing labor in the plantations whenever possible. Notwithstanding the voluntary nature of such assistance, expectations are often high and can be intuitively perceived as obligatory<sup>469</sup>. Second, some young agricultural workers perceived working in sugar cane plantations as an opportunity to gain extra earnings<sup>470</sup>.

Legally, the practice of having young agricultural workers under the age of fifteen working at the sugar cane plantation *per se* is prohibited by the LPA<sup>471</sup>, as well as by relevant international human rights obligation to which Thailand is a party<sup>472</sup>. While some young agricultural workers report their working on the plantation as being “voluntary” and without any abusive characters, the influence of the family’s “expectations” dilutes the purity of “voluntariness” of their decision. Consequently, the strict interpretation of the relevant legal provisions dictates that such practice is still illegal.

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<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Id.*

<sup>471</sup> LABOR PROTECTION ACT, *supra* note 230, art. 44.

<sup>472</sup> See Section IV.A.2 “The ILO Declaration on Fundamental Principles and Rights at Work”.

## 2. Grievance as reported by the NHRC

In addition to grievances identified by the interviewees, the NHRC report is another useful platform to obtain information on other grievances relating to Thailand's sugar industry. As previously mentioned, the NHRC is a State-based, non-judicial grievance mechanism, whose mandate is to serve as a contact point by receiving and forwarding complaints to relevant State agencies or private actors for compliance.

To date, the most notable case pertaining to a grievance against Thailand's sugar industry concerns alleged land grabbing. Recently, the NHRC received a complaint from a group of locals in Sakhon Nakhon province in the northeast of Thailand regarding an alleged trespass on national forest land and further land grabbing to make way for building new sugar mills and power plants<sup>473</sup>. In its preliminary investigation, the NHRC found that the Environmental Impact Assessment (EIA) of the project in question was not carried out properly. The locals alleged that the EIA was quickly rushed through, so that the construction of the project could be completed before the new harvest season<sup>474</sup>. After the investigation, the NHRC recommended that a new EIA be carried out, and that the locals should be allowed to participate in such assessment. The NHRC organized a meeting to provide a platform for discussions among all relevant stakeholders. Participants to the meeting included representatives from the locals, the OCSB, the Ministry of Industry, the Energy Regulatory Commission, the Department of Public Work and Town and Country Planning, as well as the Governor of Sakhon Nakhon and the Mayor of the Um-jan Subdistrict Administration Organization<sup>475</sup>. At the time of writing, the lawfulness of constructing the project on the designated land plots remains disputed, but the deterring effect of the

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<sup>473</sup> Thai Post, *Local authorities accused of corruption on sugar mills and power-plants* (Sept. 23, 2017, 10:40 AM), <http://www.ryt9.com/s/tpd/2603477>.

<sup>474</sup> *Id.*

<sup>475</sup> NHRC, *Investigation on the Construction of Sugar Mills and Power-plants* (Sept. 23, 2017, 11 AM), <http://www.nhrc.or.th/News/Activity-News/ตรวจสอบสวน>

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NHRC's recommendation to put a moratorium on the project, which allegedly violates human rights, should be noted<sup>476</sup>.

In addition to this case, the NHRC released a final report on allegations regarding the forced evictions of hundreds of villagers in Sre Ambel, Koh Kong province in Cambodia to the benefit of a Thai sugar producer<sup>477</sup>. The complaint to the NHRC was filed in 2010 by villagers in affected communities alleging that a Thai sugar producer violated a Cambodian law and international human rights law, through its Cambodian subsidiaries, by illegally obtaining economic land concessions (ELCs) from the Cambodian government. In its final report, the NHRC confirmed that the forced evictions in this case violated "the right of life, the right to self-determination, and the right to development"<sup>478</sup>. This report reflected the outcome of another report by Professor Surya Subedi, the United Nations Special Rapporteur on the situation of Human Rights in Cambodia, which confirms that the ELCs had human rights impacts on locals, including villagers affected by the forced evictions initiated by the Thai sugar producer<sup>479</sup>. As reported by independent experts as well as the NHRC, it can be noted that grievances arising out of land-grabbing or forced evictions are typical impacts that sugar producers may cause or contribute to that harm many agricultural workers and locals.

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<sup>476</sup> TransborderNEWS, *NHRC begins investigation on disputed land plot* (Sept. 23, 2017, 6:30 PM), <http://transbordernews.in.th/home/?p=15452>; see also Thairath, *Sugar mill dispute: who win, who lose?* (Sept. 23, 2017, 6:40 PM), <https://www.thairath.co.th/content/857584>.

<sup>477</sup> EarthRights, *Human Rights Violation in Koh Kong Sugar Plantation Confirmed by Thai Human Rights Commission* (Sept. 24, 2017, 10:40 AM), <https://www.earthrights.org/media/human-rights-violations-koh-kong-sugar-plantation-confirmed-thai-human-rights-commission>.

<sup>478</sup> *Id.*

<sup>479</sup> U.N. OHCHR, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, U.N. Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012).

## CONCLUSION

Chapter IV was dedicated to identifying grievances that would be considered admissible to operational-level grievance mechanisms. *Section IV.A* made reference to the international human rights instruments in the context of the UNGP – the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, and provided a list of the relevant human rights, such as the right to life, the elimination of all forms of forced or compulsory labor, and the abolition of child labor. *Section IV.B* explored potentially admissible grievances based on Thailand’s national legislations, particularly on labor protection and labor standards. In addition to identifying admissible grievances based on legal sources, *Section IV.C* explored grievances as encountered and identified by interviewed subcontracted agricultural workers, as well as grievances that were reported by the NHRC. Consequently, this research argued that the identified admissible grievances could provide more consistency and assistance for the administrators and/or operators of operational-level grievance mechanisms. At the same time, this consistency could provide reassurance for subcontracted agricultural workers who might question the admissibility of their grievances.



## CHAPTER V

# **Involving Business Enterprises: Establishing the Nexus**

Business enterprises can cause or contribute to adverse human rights impacts through their business operations. As such, the UNGP advocate that they should address such impacts by, among others, providing remedy through their operational-level grievance mechanisms. In the context of this research, the ultimate objective is to show that sugar producers that have a certain degree of involvement in the adverse human rights impact on subcontracted agricultural workers should provide an operational-level grievance mechanism and ensure that subcontracted agricultural workers in the supply-chain effectively have access to it. To achieve this objective, this chapter will address two important nexuses. The first nexus is between business enterprises and grievances. Building on the list of admissible grievances as discussed in the previous chapter, this chapter will explore triggering conditions that link business enterprises with the admissible grievances. The second nexus is particularly important in the context of this research. With the absence of a formal employment relationship between sugar producers and subcontracted agricultural workers, this chapter will explore the potential basis for establishing a linkage between the two actors.

## A. TRIGGERING CONDITIONS TO INVOLVE BUSINESS ENTERPRISES

Fundamentally, business enterprises have the responsibility to refrain from harm. In addition, they also have a proactive responsibility “to avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”<sup>480</sup>. The UNGP are fair in this regard; business enterprises should only bear responsibility if they are involved in the adverse human rights impact. Anchoring responsibility on business enterprises without a certain degree of involvement would render such responsibility excessive. The key question is, what actions or activities are considered as involvement. The UNGP mention three distinct terms, which will be discussed in the following sub-sections. Each term refers to different expectations that are placed on business enterprises. These terms are: cause, contribute, directly linked. In light of the UNGP general principles, the interpretation of these terms is meant to reflect the remedial and voluntary nature of the UNGP, as opposed to the fault-based interpretation as commonly found in general tort or criminal law principles.

### 1. Cause

At the outset, the UNGP require that business enterprises avoid “causing or contributing” to adverse human rights impacts<sup>481</sup>. The UNGP do not provide any practical definition as to what is considered “cause”. Referring to one of the highly regarded linguist authorities, the Oxford English Dictionary, it can be noted that to “cause” is to “make (something, especially something bad) happen”<sup>482</sup>. More specifically, a general legal analysis of the term “cause” would typically involve the discussion on the causation theory. As such, the *conditio sine qua non* test, or as known in common law jurisdictions the *but-for* test, requires

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<sup>480</sup> U.N.G.P., *supra* note 3, Principles 11, at 11.

<sup>481</sup> U.N.G.P., *supra* note 3, Principles 13(a), at 14-15.

<sup>482</sup> Oxford Dictionary, *Definition “cause”* (Jul. 24, 2017, 8:30 AM), <https://en.oxforddictionaries.com/definition/cause>.



that the harmful result must occur as a result of the damaging event<sup>483</sup>. In other words, the causation is established if, *but for* the actions or the omissions of a party, the harmful result would not have occurred. In addition to causation, liability will only arise when such harmful result is foreseeable, judged in accordance with the knowledge and experience of a particularly prudent person<sup>484</sup>. However, this paradigm should not be used against the context of the UNGP. This is because the causation theory is fault-based, meaning that the objective of finding causation is to establish liability on the wrongdoer and impose punishment. As a result, the liability analysis must be done in a restrictive manner, which potentially reduces the probability of finding business enterprises liable. In the larger context, finding liability could also deter business enterprises from voluntarily getting involved in the UNGP scheme, as they tend to be cautious of unnecessarily binding themselves to any form of liability.

On the other hand, the UNGP employ a remedial and voluntary approach. To discern the meaning of “cause” in line with the UNGP approach, referring to the Interpretive Guide to the UNGP<sup>485</sup> might be useful. The Interpretive Guide suggests that business enterprises can infringe human rights through their own activities “when they are not paying sufficient attention to this risk and how to reduce it”<sup>486</sup>, and “should cease or change the activity that is responsible, in order to prevent or mitigate the chance of impact occurring or recurring”<sup>487</sup>. From this statement, it can be reflected that a business enterprise must have a certain degree of ability to manage the chance of impact from occurring or recurring, whether by preventing (before occurring) or mitigating (after occurring or recurring). Having such ability and not exercising it should already be sufficient reason to find that the business enterprise has caused a human rights

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<sup>483</sup> CEES VAN DAM, *EUROPEAN TORT LAW* 310 (2d ed. 2013).

<sup>484</sup> Franz Bydlinski, *Methodological Approaches to the Tort Law of the ECHR*, in *TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 29, 75 (Attila Fenyves et al. eds., 2011).

<sup>485</sup> U. N. (2012). *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide*.

<sup>486</sup> *Id.*, at 11.

<sup>487</sup> *Id.*, at 18.

impact. Without establishing any liability, the business enterprise can still cause human rights impact even if it does not know or cannot foresee that such impact may occur or recur.

Following this interpretation, a business enterprise can cause an adverse human rights impact, whether through its action or omission, when it does not exercise its ability to manage the chance of impact occurring or recurring. Reciting the general dictionary meaning, a business enterprise is considered to make such human rights impact happen by not exercising its said ability<sup>488</sup>. In the context of this research, a sugar producer could be considered as “having caused” adverse human rights impacts on subcontracted agricultural workers in its supply-chain when it can be established that 1) the sugar producer had a certain degree of ability to manage the chance of such impact from occurring or recurring and 2) the sugar producer did not exercise the said ability to avoid or address the adverse human rights impact.

## 2. Contribute

Comparable to the previous sub-section, business enterprises can also “contribute to” adverse human rights impact through their own activities<sup>489</sup>, and “as a result of their business relationship with other parties”<sup>490</sup>. In other words, when one or more of the parties in a business relationship with the business enterprise cause adverse human rights impact, the business enterprise may be considered as “contributing to” such impact due to the existence of this relationship. Again, the UNGP does not provide any practical definition as to what is considered “contribution”. The general meaning of “contribute” is to “give (something) in order to help achieve or provide something”<sup>491</sup>. Typically, this would suggest that the business enterprise can be said to contribute

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<sup>488</sup> Oxford, *supra* note 482.

<sup>489</sup> U.N.G.P., *supra* note 3, Commentary Principle 13, at 14-15.

<sup>490</sup> *Id.*

<sup>491</sup> Oxford Dictionary, *Definition “contribute”* (Jul. 24, 2017, 1:20 PM), <https://en.oxforddictionaries.com/definition/contribute>.

to an adverse human rights impact merely by helping or providing something of an unclear magnitude. However, as the business enterprise itself does not cause an adverse human rights impact, to involve it into the scenario should principally require a certain material degree of involvement.

The UNGP Commentary notes that a business enterprise that may contribute to an adverse human rights impact “should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible”<sup>492</sup>. The addition of the leverage usage “to the greatest extent possible” suggests that a business enterprise does not have a complete ability to manage the chance of impact occurring or recurring. As such, while a business enterprise does not have a complete ability to cause an adverse human rights impact by itself, it can still contribute to such an impact when its contribution is “substantial”<sup>493</sup>. Substantial contribution may refer to, for instance, an activity that “facilitates or incentivizes another entity to cause an adverse impact”<sup>494</sup>.

Following this interpretation, a business enterprise can contribute to an adverse human rights impact caused by an entity with which the business enterprise has a business relationship, provided that its involvement, whether through its activities or its omission to use leverage, has a certain material or substantial degree of influence in making such adverse human rights impact happen. In the context of this research, a sugar producer can be considered as “having contributed” to adverse human rights impacts on subcontracted agricultural workers in its supply-chain, if it can be established that 1) the sugar producer has a business relationship with the entity that has caused such adverse human rights impact and 2) the sugar producer has a certain material or substantial degree of influence in making such adverse human rights impact happen, such as facilitating or incentivizing the said entity to cause such impact.

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<sup>492</sup> U.N.G.P., *supra* note 3, Commentary Principle 19, at 20-22.

<sup>493</sup> Org. for Econ. Co-Operation & Dev., OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS 20 (2016), see also <http://menguidelines.oecd.org/OECD-FAO-Guidance.pdf>.

<sup>494</sup> *Id.*

### 3. Directly linked

The last nexus to connect a business enterprise with an adverse human rights impact is relatively broad. The term used is “directly linked”, and it appears multiple times in the UNGP<sup>495</sup>. Principally, the UNGP Principle 13 requires business enterprises to prevent or mitigate adverse human rights impacts, provided that such impacts are directly linked to their operations, products or services by their business relationship, “even if they have not contributed to those impacts”<sup>496</sup>. The UNGP Commentary explains further that business relationships “are understood to include relationships with business partners, entities in their value chain (supply chain), and any other non-State or State entity directly linked to its business operations, products or services”<sup>497</sup>. However, the UNGP do not provide any definition as to under what circumstances the business relationship should be regarded as being “directly linked”.

Attempts to clarify the term “directly linked” have often been associated with the principle of vicarious, or no-fault, liability. In brief, vicarious liability imposes liability on an entity for the acts of its employee or business partner(s) even if such entity does not cause the injury<sup>498</sup>. The underlying justification for this no-fault liability stems from the presumption that all entities “are carrying on an undertaking in common and in concert”<sup>499</sup>, and the resulting benefits are commonly shared. By this very nature, all entities involved in a business undertaking should assume the risks arising from the activities that they benefit from<sup>500</sup>. However, it must be noted that applying the vicarious liability paradigm to justify the involvement of a business enterprise in an adverse human rights impact should be used with caution. Business enterprises often hesitate to associate themselves with any form of liability. Hence, the UNGP omit the use of the term “vicarious liability” and alternatively

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<sup>495</sup> U.N.G.P., *supra* note 3, Principles 13, 16, 17, 19(b).

<sup>496</sup> U.N.G.P., *supra* note 3, Principle 13(b), at 14-15.

<sup>497</sup> U.N.G.P., *supra* note 3, Principle 13, at 14.

<sup>498</sup> PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 22 (2010).

<sup>499</sup> T. BATY, VICARIOUS LIABILITY 7-8 (1916).

<sup>500</sup> NEIL HAWKE, CORPORATE LIABILITY, Section 3-04 69 (2000).

attempt to involve business enterprises through this new linkage paradigm.

Borrowing the justification for involving business enterprises from the vicarious liability principle only explains the term “linked”. As discussed, the UNGP rigorously require that such linkage be direct. To find the meaning, consulting the well-established dictionary is inevitable. The general meaning of the term “directly” is “without changing direction or stopping” and “with nothing or no one in between”<sup>501</sup>. Reading this together with the justification for this linkage, an adverse human rights impact is deemed to be “directly linked” to a business enterprise when such business enterprise benefits from its business partner’s operations, products or services that cause the identified adverse human rights impact, provided that such benefit consistently remains in its original form without changing or without intervention.

The three channels in which the UNGP envisage the involvement of business enterprises to bear responsibility for adverse human rights impacts create different consequences. Principally, business enterprises that cause or contribute to adverse human rights impacts are required to avoid doing so and address such impacts when they occur<sup>502</sup>. To a lesser extent, business enterprises are only required to seek to prevent or mitigate (as opposed to avoid or address) adverse human rights impacts when they are directly linked to their operations, products or services by their business relationships. However, the UNGP further recommend causers or contributors that they should provide for or cooperate in their remediation through legitimate process<sup>503</sup>, including through effective operational-level grievance mechanisms<sup>504</sup>. In the context of this research, a sugar producer can be considered as being “directly linked” to adverse human rights impacts on subcontracted agricultural workers in its supply-chain, if it can be established that 1) the sugar producer has a business relationship with the entity that has caused such adverse

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<sup>501</sup> Oxford Dictionary, *Definition “directly”* (Jul. 24, 2017, 4:10 PM), <https://en.oxforddictionaries.com/definition/directly>.

<sup>502</sup> U.N.G.P., *supra* note 3, Principle 13(a), at 14.

<sup>503</sup> U.N.G.P., *supra* note 3, Principle 22, at 24-25.

<sup>504</sup> U.N.G.P., *supra* note 3, Commentary Principle 22, at 24-25.

human rights impact and 2) the sugar producer benefits from the operations, products or services of such entity.

## **B. ESTABLISHING LINKAGE BETWEEN BUSINESS ENTERPRISES AND NON-EMPLOYEE COMPLAINANTS BEYOND THE EMPLOYMENT CONDITION**

This section explores the potential basis for establishing linkage between business enterprises and non-employee complainants beyond the employment condition in order to enhance the accessibility for these non-employee complainants to operational-level grievance mechanisms administered or operated by business enterprises. In the context of this research, this would be the linkage between sugar producers and subcontracted agricultural workers. At present, the analyzed example of an operational-level grievance mechanism in Thailand's sugar industry – the Mitr Phol mechanism – only allows Mitr Phol's employees to access it. As such, subcontracted agricultural workers in the Mitr Phol supply-chain currently do not have access to this operational-level grievance mechanism. This limitation is inevitably due to the absence of a formal employment relationship between Mitr Phol Sugar Corp. and subcontracted agricultural workers in the Mitr Phol supply-chain.

This research recognizes that in today's world, one of the most popular business operation methods is the practice of "outsourcing". In the interest of cost-saving, many business enterprises allocate certain jobs, tasks, or functions to be done externally, instead of handling them with their own employees<sup>505</sup>. Outsourcing can arguably contribute to a speedier business growth, while keeping the labor and overhead costs to a minimum<sup>506</sup>. Typically, a business enterprise hires an independent

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<sup>505</sup> The Entrepreneur, *Outsourcing* (Oct. 4, 2017, 11:15 AM), <https://www.entrepreneur.com/encyclopedia/outsourcing>.

<sup>506</sup> *Id.*

subcontractor to perform a task or complete a project<sup>507</sup>. Sugar producers in Thailand's sugar cane supply-chain also adopt this business practice, as they hire several subcontractors to harvest and procure sugar canes for them. As previously explained, subcontractors then employ subcontracted agricultural workers to perform such task.

In outsourcing there is no legal relationship between business enterprises and non-employee complainants. Business enterprises may be hesitant to bear responsibility for non-employee complainants, with whom they have neither formal nor legal connection. Therefore, it is vital to explore possible channels or grounds to circumvent this limitation in the interest of expanding access to remedy to encompass non-employee complainants, such as subcontracted agricultural workers. This research argues that the inclusiveness character of the UNGP provides a preliminary justification for establishing linkage between business enterprises and non-employee complainants. Furthermore, this research will study existing laws in several other jurisdictions to explore a potential legal basis that might provide reasoning for linking business enterprises to non-employee complainants. Due to the commonality with Thailand in terms of economy, labor economics and geographical location, the countries selected for examination are members of the ASEAN – the Association of Southeast Asian Nations – where Thailand is a member. Currently, there are ten ASEAN member countries: Thailand, Indonesia, the Philippines, Malaysia, Singapore, Vietnam, Brunei, Laos, Myanmar, and Cambodia.

## **1. The UNGP's inclusiveness**

As can be expected, the UNGP advocate for embracing the participation of all actors, including business enterprises, towards achieving its objective. This inclusiveness approach is explicitly stated in the UNGP Principle 11, which suggests that “business enterprises should respect human rights”, “should avoid infringing on the human rights of others

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<sup>507</sup> BusinessDictionary, *Subcontracting* (Oct. 4, 2017, 11:20 AM), <http://www.businessdictionary.com/definition/subcontracting.html>.

and should address adverse human rights impacts with which they are involved”<sup>508</sup>. Recalling the previous discussion in *Section V.A*, a business enterprise can become involved when it causes or contributes to an adverse human rights impact, or when such impact is directly linked to its operations, products or services by its business relationships. Potentially affected actors include its employees, customers, workers in the supply-chains or communities around its operations<sup>509</sup>. It must be noted that the categorization of potentially affected actors by the Interpretive Guide separates employees from workers in the supply-chain. The specific mentioning of the term “workers” not only recognizes that potential limitations might arise from the lack of formal employment relationship, but also reinstates the fundamental inclusiveness objective of the UNGP that business enterprises should also be responsible to workers in their supply-chain, such as subcontracted agricultural workers, even if they do not have a formal employment relationship with them.

## **2. Extending the scope of employer’s obligation and liabilities to non-employees: A brief look at labor laws in ASEAN countries**

The first basis for establishing linkage between business enterprises and non-employee complainants is the extension of the scope of employer’s obligation to non-employees. This extension is found in the labor laws of several ASEAN jurisdictions, reflecting the recognition of the practice of subcontracting work. Principally, an employer must perform certain obligations towards its employees, such as paying wages and providing welfare. However, when a supply-chain involves the subcontracting of work, labor laws in some jurisdictions oblige a business enterprise (as a client of a subcontractor) to perform obligations directly towards subcontracted workers based on certain conditions. In the context of this research, such labor laws would effectively oblige sugar producers to perform certain obligations towards subcontracted agricultural workers,

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<sup>508</sup> U.N.G.P., *supra* note 3, Principle 11, at 13.

<sup>509</sup> U.N., *supra* note 485, at 10-11.



provided that the conditions prescribed in the respective labor law are met.

The second basis for establishing linkage between business enterprises and non-employee complainants is the extension of the scope of employer's liabilities to non-employees. Also found in the labor laws of several ASEAN jurisdictions, this extension circumvents the conventional restriction of requiring a formal employment relationship by resorting to the civil law principle of solidary liability. Alternatively referred to as solidary obligations, or an obligation *in solido*, the solidary liability allows one creditor to claim a full amount due from one of many debtors. In other words, each debtor, notwithstanding the agreed percentage of debt-sharing among many debtors, is liable for the whole amount of debt demanded by one creditor<sup>510</sup>. Once one of the debtors has performed an obligation, a performance by a single debtor releases the others towards the creditor<sup>511</sup>. In common law jurisdiction, this arrangement is comparatively referred to as the doctrine of joint and several liabilities. When more than one debtors are jointly and severally liable to a creditor, the creditor may pursue an entire obligation from one of the debtors as if all the debtors were jointly liable. Once one of the debtors have performed an obligation, this debtor must pursue the other debtors for a contribution to their share of the liability<sup>512</sup>.

Putting this into the human rights context discussed herein, a subcontracted worker would be considered a creditor on the one end, and a business enterprise (a client) and a subcontractor would be considered joint debtors on the other end. Hence, the subcontracted worker could bypass the subcontractor and claim damage directly from the client. Once

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<sup>510</sup> OLE LANDO, ANDRÉ PRÜM, ERIC CLIVE, REINHARD ZIMMERMAN, *PRINCIPLES OF EUROPEAN CONTRACT LAW PART III* xxi (2003), also available at [http://www.fd.unl.pt/docentes\\_docs/ma/mhb\\_ma\\_12497.pdf](http://www.fd.unl.pt/docentes_docs/ma/mhb_ma_12497.pdf).

<sup>511</sup> For instance, Civil Code of Québec, S.Q. 2009, art. 1523 (Can.); LA. CIV. CODE ANN. art. 1756, 1790 (2011).

<sup>512</sup> Aaron Larson, *Negligence and Tort Law* (Sep. 21, 2017, 10:15 AM), [https://www.expertlaw.com/library/personal\\_injury/negligence.html](https://www.expertlaw.com/library/personal_injury/negligence.html); see also *Review of Joint and Several Liability*, LAW COMM. N.Z., Nov. 2012, available at New Zealand Law Commission: Online, NZLC IP32.

the client has provided remedy to the subcontracted worker, it can then pursue the subcontractor for the latter's share of liability. In the law of contract, the use of the solidary liability or the joint and several liabilities must be clearly indicated in the contract. However, in the human rights context, separate legal provisions are necessary to embed and activate the use of the principle of solidary liability or the joint and several liabilities to circumvent a conventional employment relationship restriction for the protection of subcontracted workers. Legal references to both principles differ from country to country. Some countries only have a small guideline for courts to exercise their discretion, while some countries have specific provisions addressing the principle of solidary liability or the doctrine of joint and several liabilities.

This section will illustrate the extension of the scope of an employer's obligation and liabilities to non-employees as found in the labor laws of the ASEAN countries.

### ***a. Indonesia***

Indonesian law is based on a civil legal system. Its main source of labor protection, the Act of the Republic of Indonesia Concerning Manpower<sup>513</sup>, requires that an employment relation or relationship (*hubungan kerja*) between a business enterprise (an employer/a client of a subcontractor) and a worker/laborer (an employee) must be based on a work/employment agreement, prescribing job-related aspects such as wages, orders, and instructions<sup>514</sup>. Principally, without such an agreement, a client cannot be regarded as having an employment relationship with a subcontracted worker, and therefore is not liable for any human rights impacts incurred. However, the Act recognizes the possibility of subcontracting work and stipulates specific provisions to

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<sup>513</sup> ACT OF THE REPUBLIC OF INDONESIA CONCERNING MANPOWER (2003) (Indo.), also available at <https://www.ilo.org/dyn/travail/docs/760/Indonesian%20Labour%20Law%20-%20Act%2013%20of%202003.pdf>.

<sup>514</sup> *Id.*, art. 1(15).

allow the performance of such practice<sup>515</sup>. Article 65 of the Act outlines several important elements of permitted subcontracting work. First, a subcontractor<sup>516</sup> must be a legal entity<sup>517</sup>. Second, permitted subcontracting work must be work that can be kept separate from the main business activity, that is to be undertaken by either a direct or indirect order of the client, that is an entirely auxiliary activity of the client, and that does not directly inhibit the production process of the client<sup>518</sup>. Third, the protection and working conditions provided to subcontracted workers must be the same as the ones provided by the client to its actual employees<sup>519</sup>. Hence, under the Indonesian labor law, a business enterprise (or a client) is obliged to provide protection and appropriate working conditions to subcontracted workers, provided that all legal conditions are met. If the business enterprise provides an operational-level grievance mechanism to its employees as part of the working condition, this operational-level grievance mechanism should also be accessible by affected subcontracted workers.

Failing to meet the criteria will result in the extension of the scope of liability. If it can be proven that a business enterprise did not provide the same protection and working conditions to subcontracted workers as to its actual employees, the business enterprise (the client) will be held legally responsible for them, as the law creates a new employment relationship between the client and the subcontracted workers<sup>520</sup>. As a result, the client must ensure that all criteria are met to avoid becoming legally responsible for the subcontracted workers. This setup incentivizes the client to offer the same level of protection and working conditions to subcontracted workers, along with other requirements. Thus, provided that all the criteria are met, the client is relieved from assuming legal responsibility for potential human rights impacts occurring over the course of work, and the subcontracted worker can only seek legal responsibility from its direct employer – the subcontractor. For

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<sup>515</sup> *Id.*, art. 64.

<sup>516</sup> *Id.*, art. 65(1).

<sup>517</sup> *Id.*, art. 65(3).

<sup>518</sup> *Id.*, art. 65(2).

<sup>519</sup> *Id.*, art. 65(4).

<sup>520</sup> *Id.*, art. 65(8).

Indonesia, the principle of solidary liability applies conditionally, dependent on the satisfaction of such criteria. In the event of non-satisfaction the client is legally responsible for the subcontracted workers and may choose to provide remedy for the subcontracted worker through its operational-level grievance mechanism.

### ***b. The Philippines***

The Philippines' legal system is a combination of civil and Anglo-American common law. The Labor Code of the Philippines<sup>521</sup> (hereinafter referred to as "the Filipino Code") provides a comprehensive collection with regard to the protection of rights of workers as well as the promotion of full employment and equal work opportunities<sup>522</sup>. Interestingly, the Filipino Code adopts a labor-friendly approach by clearly stating that any doubts in the implementation and interpretation of the provisions of the Code, including its implementing rules and regulations, shall be resolved in favor of laborer<sup>523</sup>. The Filipino Code also clarifies any potential doubts regarding its applicable personal scope, by clearly stating that both agricultural and non-agricultural workers shall benefit from the rights granted by the Code<sup>524</sup>. The labor-friendly and inclusive character of the Filipino Code is further reiterated by its expansion of applicable personal scope to include unemployed workers. Article 13 of the Filipino Code defines "workers" as any member of the labor force, whether employed or unemployed<sup>525</sup>. This definition deviates from the conventional approach found in other jurisdictions where a status of employment is typically required to activate the labor protection of a worker under applicable laws. Instead, under this Code a worker with an employment contract is distinctly defined as "an employee"<sup>526</sup>.

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<sup>521</sup> LABOR CODE, Pres. Dec. (No. 442) (1974), as amended (Phil.).

<sup>522</sup> *Id.*, art. 3.

<sup>523</sup> *Id.*, art. 4.

<sup>524</sup> *Id.*, art. 6.

<sup>525</sup> *Id.*, art. 13.

<sup>526</sup> *Id.*, art. 97(3).

Provisions relating to subcontracting work also reflect the protectionist nature of the Filipino Code. To start, it recognizes the practice of subcontracting work, where a client concludes a contract with a subcontractor, requiring the subcontractor's employees (subcontracted workers) to perform the work for the client<sup>527</sup>. When the subcontractor, who is the direct employer of the subcontracted workers, fails to pay wages, the Filipino Code clearly imposes that the client shall be jointly and severally liable to pay wages to them to the extent that work has been performed under the contract. As such, the Filipino Code further requires the client to pay wages "in the same manner and extent that [the client] is liable to employees directly employed by [the client]"<sup>528</sup>. Unlike various comparable laws in other jurisdictions, the Filipino Code extends the protection of subcontracted workers beyond the issue of wage. Accordingly, the client is regarded as a direct employer of the subcontracted workers and, therefore, is responsible for them in the same manner and to the same extent as if the subcontracted workers were directly employed, on two conditions: first, the subcontractor does not have substantial capital or investment in the form of tools, equipment, machineries, work premises and so on; and second, the subcontracted workers are recruited and placed to perform activities which are directly related to the principal business of the client<sup>529</sup>. Essentially, these broad conditions are likely to mirror the actual scenario of most subcontracting work in the Philippines. As a result, most clients are deemed direct employers of the subcontracted workers and, therefore, are generally responsible for the subcontracted workers based on the provisions of the Code. In the unlikely event that the two conditions are not met, the Filipino Code imposes the solidary liability on the client by clearly stating that it "shall be held responsible with his [or her] subcontractor for any violation of any provision of the Code", and for purposes of determining the extent of the civil liability, the client and his or her subcontractor shall be considered as direct employers to the subcontracted workers<sup>530</sup>. In addition, to avoid any circumvention of the provisions in this Code, the Secretary of Labor and Employment is

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<sup>527</sup> *Id.*, art. 106 para 1.

<sup>528</sup> *Id.*, art. 106 para 2.

<sup>529</sup> *Id.*, art. 106 para 4.

<sup>530</sup> *Id.*, art. 109.

authorized to restrict or prohibit the contracting-out of labor on a case-by-case basis to protect the rights of the workers established by the Code<sup>531</sup>. Consequently, when the solidary liability is activated, the client should provide remedy to the subcontracted workers through its operational-level grievance mechanism.

### *c. Malaysia*

Due to the colonization by the British Empire in the 19<sup>th</sup> century, the law of Malaysia is historically based on the Common Law. In addition, the Parliament enacts federal laws that are applicable to the entire country, whereas each State Legislative Assembly enacts state laws, which are only applicable in the respective state. As a federal law, the Employment Act of 1955<sup>532</sup> applies nationwide. The Employment Act requires that an employer-employee relationship be formed on a contractual basis, and the word “employ”, with its grammatical variations and cognate expressions, shall be construed accordingly<sup>533</sup>. Specifically, the Employment Act stipulates that any employment in agricultural undertakings can only be formed under a contract of service unless otherwise allowed by the Minister of Labor<sup>534</sup>. Subcontracting work is permitted, and the Employment Act expressly adopts a common-law principle of joint and several liabilities on a client (referred to in the Act as a principal) and a subcontractor regarding the issue of wage. Section 33 of the Employment Act stipulates that when a wage is owed to a subcontracted worker for work done as part of the performance of the contract, the client and the subcontractor shall be jointly and severally liable to pay such wages “as if” the subcontracted worker “had been immediately employed” by the client<sup>535</sup>. A subcontracted worker must first institute a proceeding against the client for the recovery of wages to the Director General within 90 days from the date on which such wages

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<sup>531</sup> *Id.*, art. 106 para 3.

<sup>532</sup> EMPLOYMENT ACT (1955) (Malay.).

<sup>533</sup> *Id.*, art. 2.

<sup>534</sup> *Id.*, art. 2A(1).

<sup>535</sup> *Id.*, art. 33.

become due for payment<sup>536</sup>. Consequently, a subcontracted worker can claim the full amount of wages, however, only up to three consecutive months<sup>537</sup>, directly from the client, and the client can subsequently recover such payment from the subcontractor<sup>538</sup>. The extension of liability may encourage the client to provide remedy by devising its operational-level grievance mechanism and making it accessible to the subcontracted workers as an alternative to the proceeding prescribed by law.

#### *d. Singapore*

Historically a common law country, Singapore relies heavily on judge-made law. To determine the validity and existence of an employment contract, referred to as “a contract of service”, one must preliminarily establish that there is an employer-employee relationship where an employee does business for an employer, the contract contains terms of employment, and the contract may be covered by the Employment Act<sup>539</sup>. Recognizing the fact that such guidelines are not conclusive, further discretion may be applied by considering the question of who has the control, who owns the factors of production, and other economic considerations<sup>540</sup>. If relevant factors are satisfied, the contract in question may be considered a contract of service, and the employer must be liable for damages caused to its employee. Alternatively, Singapore’s Employment Act<sup>541</sup> adopts the common law principle of joint and several liabilities to address the liability of a client, an agency, and subcontracted workers. However, the scope of the statute is only for liability relating to salary. Section 65(1) of the Employment Act stipulates that “the principal (a client) and the contractor (an agency) and any such subcontractor (not

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<sup>536</sup> *Id.*, art. 69.

<sup>537</sup> *Id.*, art. 33(1)(b).

<sup>538</sup> *Id.*, art. 33(2).

<sup>539</sup> Ministry of Manpower, *Contract of Service* (Jul. 26, 2017, 9:10 AM)

<http://www.mom.gov.sg/employment-practices/contract-of-service#contract-of-service-vs-contract-for-service>.

<sup>540</sup> *Id.*

<sup>541</sup> EMPLOYMENT ACT (1968) (Sing.).

being the employer) shall be jointly and severally liable with the employer to pay the workman (the subcontracted workers) as if the workman had been immediately employed by him”<sup>542</sup>. Consequently, a subcontracted worker can claim the full amount of salary either from a client or from the agency. If the client is the pursued debtor, it can seek to have the amount of money it paid to the subcontracted worker reimbursed by the agency – the actual employer of the subcontracted worker. Other human rights-related issues beyond the reimbursement of salary are not included in the Employment Act. Like Malaysia, the extension of liability may encourage the client to provide remedy by devising its operational-level grievance mechanism and making it accessible to the subcontracted workers as an alternative option to the proceeding prescribed by law.

### *e. Vietnam*

The Vietnamese legal system is heavily influenced by both the socialism legal theory and the French civil legal system<sup>543</sup>. The Labor Code of 1994 is the core of the labor law in Vietnam<sup>544</sup>, articulating clearly that it is the responsibility of the Vietnamese government and society to ensure employment opportunities for everyone who has the capacity to work<sup>545</sup>. The Code applies to all workers under an employment contract<sup>546</sup> in all economic sectors and all forms of ownership<sup>547</sup>. The Code allows the practice of subcontracting work. Principally, a subcontracted worker does not have an employment relationship with a client. However, the Code imposes two important obligations on the client despite the absence of a formal employment relationship with the subcontracted worker: first, the client must maintain a list of the names and addresses of

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<sup>542</sup> *Id.*, art. 65(1).

<sup>543</sup> Kenfox, *Basic structure of Vietnam legal system* (Oct. 7, 2017, 8 AM), <http://www.kenfoxlaw.com/legal-topics/12958-basic-structure-of-vietnam-legal-system.html>.

<sup>544</sup> THE LABOR CODE (1994) (Viet.).

<sup>545</sup> *Id.*, art. 13.

<sup>546</sup> *Id.*, art. 6.

<sup>547</sup> *Id.*, art. 2.



subcontracted workers along with the client's own employees; second, the client must comply with the law on remuneration and occupational safety and health<sup>548</sup>. When a subcontractor fails to pay wages or fails to ensure other rights and interests of the subcontracted workers, they can demand the payment of their wages or the fulfillment of relevant rights and interests directly from the client<sup>549</sup>. Then, the client can demand compensation from the subcontractor by requesting competent authorities to settle the labor dispute, thus reflecting the use of the principle of solidary liability. In Vietnam, individual labor disputes are resolved at the Labor Conciliation Council, required by the Code to be established in every business enterprise employing ten or more workers and comprising an equal number of representatives from both the workers and the employers<sup>550</sup>. If the dispute cannot be resolved at this stage, parties can bring the case to the People's Court<sup>551</sup>. In order to avoid the State-based proceeding, the client may opt to devise its own operational-level grievance mechanism and allow the subcontracted workers to have access to it.

### *f. Brunei*

The legal system of Brunei is a combination of the British common law and the Islamic Sharia law. The Sharia law is predominantly applicable for Muslim citizens and supersedes the British common law on issues concerning family and property law<sup>552</sup>. For labor law, the main legal source is the Law of Brunei Chapter 93 on Labor Law<sup>553</sup> (hereinafter referred to as "the Brunei Code"). The Brunei Code also requires evidence of an agreement or a contract of employment for an employment relationship to be recognized by law, and only briefly

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<sup>548</sup> *Id.*, art. 65(1).

<sup>549</sup> *Id.*, art. 65(2).

<sup>550</sup> *Id.*, art. 163.

<sup>551</sup> *Id.*, art. 166.

<sup>552</sup> Southeast Asian Research Guide, *Introduction to Brunei and its Legal System* (Oct. 8, 2017, 3 PM),

<http://unimelb.libguides.com/c.php?g=402982&p=4622754>.

<sup>553</sup> LAWS OF BRUNEI CHAPTER 93 LABOR (1954, revised 2002) (Brun.).

mentions the practice of subcontracting work in its interpretation of the term “employer”<sup>554</sup>. Under the Brunei Code, a business enterprise (a client) who enters into an agreement with a subcontractor “for the execution by or under the subcontractor of the whole or any part of any work undertaken by the client”, the client shall be liable for the payment of unpaid wages (up to the period of three months) to subcontracted workers<sup>555</sup>. Violation of this obligation may be investigated *sua sponte* by the Commissioner of Labor<sup>556</sup>, appointed by the King<sup>557</sup>. Hence, a business enterprise (a client) may be encouraged to establish its own operational-level grievance mechanism in order to provide remedy to subcontracted workers prior to being detected by the Commissioner of Labor.

### ***g. Cambodia***

Based on the French civil legal system, Cambodian law is predominantly statutory-based<sup>558</sup>. The main source of Cambodian labor law is the Labor Code adopted by the National Assembly in 1997<sup>559</sup> (hereinafter referred to as “the Cambodian Code”). The Cambodian Code explicitly requires evidence of a written employment contract to be considered “in the sense of this law” as “workers”<sup>560</sup>. Subcontracting work is permissible, and an agreement to subcontract work between a business enterprise (a client or an entrepreneur) and a subcontractor must be made in writing<sup>561</sup>. Under this scheme, subcontracted workers are, therefore, employees of the subcontractor and not of the business enterprise. Nevertheless, in case of insolvency or default by the subcontractor, the Cambodian Code obliges

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<sup>554</sup> *Id.*, art. 2.

<sup>555</sup> *Id.*

<sup>556</sup> *Id.*, art. 7.

<sup>557</sup> *Id.*, art. 3.

<sup>558</sup> Southeast Asian Research Guide, *Introduction to Cambodia and its Legal System* (Oct. 8, 2017, 4:30 PM),

<http://unimelb.libguides.com/c.php?g=402982&p=4785153>.

<sup>559</sup> THE LABOR CODE (1997) (Camb.).

<sup>560</sup> *Id.*, art. 3.

<sup>561</sup> *Id.*, art. 45.

the business enterprise (the client) to substitute and fulfill the obligations of the subcontractor for the subcontracted worker<sup>562</sup>. Also, the subcontracted worker in such case may file a claim directly against the business enterprise (the client)<sup>563</sup>. In effect, the Cambodian Code utilizes the solidary obligation to extend the scope of liability to the business enterprise. With this linkage, the business enterprise (the client) may be incentivized to establish its own operational-level grievance mechanism in order to provide remedy to subcontracted workers and avoid potential judicial proceedings.

#### ***h. Laos***

The Laos legal system has a trace of influence from the French civil legal system, and legislation is a primary source of law<sup>564</sup>. In 2013, the new Labor Code, entitled the General Labor and Employment Acts, was enacted<sup>565</sup>. This Code requires evidence of a written employment contract for the determination of an employer-employee relationship status<sup>566</sup>. However, it contains neither any references to the practice of subcontracting work, nor the extension of the scope of the business enterprises' obligations and liabilities to their non-employees.

#### ***i. Myanmar***

Myanmar adopts the common law system since the late nineteenth century following the colonization by the British Empire. Hence, the principal sources of Myanmar law are customary law, English common

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<sup>562</sup> *Id.*, art. 48 para 1.

<sup>563</sup> *Id.*, art. 48 para 2.

<sup>564</sup> Southeast Asian Research Guide, *Introduction to Laos PDR and its Legal System* (Oct. 8, 2017, 6:10 PM), <http://unimelb.libguides.com/c.php?g=402982&p=4600311>.

<sup>565</sup> LABOR CODES, GENERAL LABOR AND EMPLOYMENT ACTS (2013) (Laos).

<sup>566</sup> *Id.*, art. 3(3), 3(4).

law, legislations, and judicial decisions<sup>567</sup>. Despite its common-law background, Myanmar also has a list of labor-related laws that address various aspects of labor and employment. Under the Employment and Skill Development Law, every employee must be employed under a written contract<sup>568</sup>. On dispute resolution, the Settlement of Labor Dispute Law<sup>569</sup> outlines a procedure that allows a worker to instigate a claim, starting from the workplace coordinating committee, the township conciliation body, and, if the claim remains unresolved, to competent courts. Notwithstanding the availability of rather well established state-based grievance mechanisms, a subcontracted worker cannot instigate a claim against his or her non-employer – a business enterprise that subcontracts work to its subcontractor. To date, there is no reference in the Myanmar labor law that clearly addresses the practice of subcontracting work and the extension of the scope of the business enterprises’ obligations and liabilities to their non-employees.

## ***j. Thailand***

Compared to the relevant provisions on the principle of solidary liability in other jurisdictions where separate provisions are often required and used, the Labor Protection Act (LPA) addresses this matter by amending the definition of “employer”. In the recent 2008 amendment to the LPA, the term “employer” was given an additional definition. Previously, “employer” only meant an entity that employed an employee and paid wages accordingly, and such entity could be a person, an agent acting on behalf of a person, or a representative acting on behalf of a legal person<sup>570</sup>. After the amendment, the definition of “employer” was extended to include an entity (a client) that contracted out (subcontracted) the supervision of work and payment of wages, or assigned any person to recruit employees for work other than an

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<sup>567</sup> Southeast Asian Research Guide, *Introduction to Myanmar and its Legal System* (Oct. 8, 2017, 6:45 PM), <http://unimelb.libguides.com/c.php?g=402982&p=4622248>.

<sup>568</sup> EMPLOYMENT AND SKILL DEVELOPMENT LAW (2013) (Myan.).

<sup>569</sup> SETTLEMENT OF DISPUTE LAW (2012) (Myan.).

<sup>570</sup> LABOR PROTECTION ACT, *supra* note 230, art. 5 para 1(1), 5 para 1(2).

employment service, and in a manner that the work was part of the entire production or business under the responsibility of such entity (the client). In this regard, the entity was deemed to be an employer of the subcontracted workers<sup>571</sup>. More specifically on outsourcing, the LPA now provides that the client is deemed an employer of the employees of the outsourcing company (subcontracted workers), provided that the outsourcing company is not a job-procurement business, and the work of subcontracted workers is part of the manufacturing process of the client or is under the responsibility of the client<sup>572</sup>. To this effect, if the employees of the client and the subcontracted workers have similar job descriptions, the client must provide fair benefits and welfare to both groups without discrimination<sup>573</sup>.

The LPA also provides a definition for subcontractors. Categorized in different tiers, a “first-level subcontractor” means a person who agrees to carry out all or part of a job for the benefit of the client, and other subcontractors who have an agreement with the first-level or an immediately preceding subcontractor to carry out all or part of a job under the responsibility of the first-level or immediately preceding subcontractor, regardless of how many tiers of sub-contractors there may be, is collectively called a “subcontractor”<sup>574</sup>. Hence, in practice there can be multiple tiers of subcontracting work within one supply-chain, and this practice is recognized by the LPA.

Delegating liability among several subcontractors over multiple tiers in a supply-chain without clear legal certainty can be a complex task. As such, the LPA provides legal protection for subcontracted workers by making the subcontractors of all levels, from the immediately preceding subcontractor up to the first-level subcontractor, be jointly liable with the subcontractor who is their employer<sup>575</sup>. However, the scope of the solidary liability is limited to issues relating to wages, overtime pay, holiday pay, holiday overtime pay, compensation payments, special

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<sup>571</sup> LABOR PROTECTION ACT, *supra* note 230, art. 5 para 1(3).

<sup>572</sup> LABOR PROTECTION ACT, *supra* note 230, art. 11/1 para 1.

<sup>573</sup> LABOR PROTECTION ACT, *supra* note 230, art. 11/1 para 2.

<sup>574</sup> LABOR PROTECTION ACT, *supra* note 230, art. 5 para 5.

<sup>575</sup> LABOR PROTECTION ACT, *supra* note 230, art. 12 para 1.

compensation payments, savings, contributions or surcharges<sup>576</sup>. After one of the jointly liable subcontractors has paid the subcontracted workers in accordance with the prescribed scope, he or she shall have the right to seek redress from the subcontractor who is the immediate employer of the subcontracted workers<sup>577</sup>.

### **3. Towards the UNGP's inclusiveness: Strengthening the linkage**

While the UNGP advocate for the inclusiveness of all actors, they do not specify how this objective can be achieved. Several jurisdictions still have labor-related laws that may virtually contravene the inclusiveness approach of the UNGP. Conventionally, a formal employer-employee relationship can only be established by means of a written contract or agreement, and only through such formality shall an employer bear any legal responsibility to its employees and no-one else. However, to accommodate the business needs for lowering operational costs through outsourcing or subcontracting work, a separate scheme to establish linkage between a business enterprise and subcontracted workers becomes necessary. To circumvent this conventional restriction by extending the eligibility of access to remedy to subcontracted workers, some jurisdictions appear to already have a certain system in place that, in effect, accommodates this objective.

The study of labor laws in ASEAN countries reveals that some of them extend the scope of the employer's obligations and liabilities to its non-employees by redefining the term "employer", clearly imposing obligations towards non-employees based on certain conditions, or resorting to their respective joint liability schemes – the principle of solidary liability in the civil law countries and the doctrine of joint and several liabilities in the common law countries.

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<sup>576</sup> *Id.*

<sup>577</sup> LABOR PROTECTION ACT, *supra* note 230, art. 12 para 2.

Despite the existence of some linkages, the application of such linkage remains limited in subject matter. While human rights violations (identified as grievances in this research) can occur in many ways, the study shows that the common ground for allowing the application of such linkages in the relevant laws is the issue of remuneration, particularly on wages. That is subcontracted workers are normally provided with a legal ground to seek remedy from a business enterprise (a client) when the subject matter concerns the non-payment of wages by their employer (a subcontractor). Other grounds, such as payment of compensation, the provision of welfare benefits and the protection of occupational safety and health, can only be found in some jurisdictions. The spectrum of protection varies from the ultimate protection virtually on all possible grounds “as if the subcontracted worker is employed by the client” as evident in the laws of the Philippines and Indonesia to limiting the protection only to non-payment of wages grounds as evident in the laws of Malaysia, Singapore and Thailand. For Thailand, there are some obstacles, both legal and practical, that potentially hinder the access to remedy for subcontracted workers. First, as mentioned, the scope of issues that can trigger the solidary liability is only limited to non-payment of wages, whereas other potential adverse human rights impacts could involve other issues such as working conditions and child labor. Second, while the LPA imposes joint liability on several levels of subcontractors, it leaves out the client from the liability scheme. In the context of this research, subcontracted agricultural workers can only seek redress from a pool of subcontractors, if they cannot claim their rights from the subcontractor who is their direct employer. Third, although the LPA requires the client to provide benefits and welfare to subcontracted agricultural workers, whose work is part of the manufacturing process or under the responsibility of the client, the provision of such benefits and welfare is conditioned on having the same job description as the employees of the client<sup>578</sup>. In practice, sugar producers rarely employ agricultural workers, and if they do, the data comparison of benefits and welfare between employed agricultural workers and subcontracted agricultural workers is inaccessible.

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<sup>578</sup> LABOR PROTECTION ACT, *supra* note 230, art. 11/1 para. 2.

Moreover, some jurisdictions have legal provisions addressing dispute resolution between the client and the subcontracted workers. For instance, Brunei grants the competence to the Commissioner of Labor to investigate the violation of the Brunei Code *sua sponte*<sup>579</sup>, whereas Vietnam requires the use of the Labor Conciliation Council as dispute resolution arena<sup>580</sup>. By subjecting the dispute resolution to public authority, business enterprises risk encountering some lengthy remedy process and a potentially negative effect on their public relations image. This could incentivize business enterprises to resort to resolving disputes through their own operational-level grievance mechanisms.

Consequently, the extension of the scope of employer obligations and liabilities found in the labor laws of some ASEAN countries provides a legal basis that establishes the linkage between business enterprises and their non-employees. This linkage could send a message to business enterprises that it may be more advisable for them to resolve disputes and provide remedy for non-employees, e.g. subcontracted workers, in their supply-chain through their own operational-level grievance mechanisms in order to avoid encountering potential negative publicity. As such, it is essential to ensure that non-employees, such as subcontracted agricultural workers, can effectively access operational-level grievances mechanisms, and potential barriers are removed or reduced.

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<sup>579</sup> LABOR CODE, *supra* note 553, art. 7.

<sup>580</sup> ACT, *supra* note 544, art. 163.



**Figure 10 -  
Labor Laws in ASEAN Countries Providing Linkage between  
Business Enterprises and Non-Employee Complainants beyond the  
Employment Condition**

	Indonesia	Philippines	Malaysia	Singapore	Vietnam	Brunei	Cambodia	Laos	Myanmar	Thailand*
<b>Approaches</b>										
Written employment contract required	○	○	○	○	○	○	○	○	○	○
Subcontracting works permitted	○	○	○	○	○	○	○			○
Extension of obligations	○	○	○	○	○		○			○
Extension of liabilities	○	○	○	○	○	○	○			○
<b>Protections</b>										
Wage	○	○	○	○	○	○	○			○
Other remunerations e.g. overtime	○	○			○		○			○
Working conditions e.g. days, hours	○	○					○			○
Occupational safety and health	○	○			○		○			○
Welfare benefits	○	○					○			○
Dispute resolution					○	○			○	

\*In Thailand, provision of benefits and welfare by the client for subcontracted agricultural workers depends on the existence of benefits and welfare the client provides for its own employees working under the same job description.

## CONCLUSION

Chapter V was dedicated to establishing a linkage between sugar producers and subcontracted agricultural workers in order to argue that, with the existence of certain linkage, sugar producer would be in a better position if they provided an operational-level grievance mechanism and ensured that subcontracted agricultural workers in the supply-chain effectively had access to it. *Section V.A* explored the first nexus between business enterprises and admissible grievances. Based on the UNGP, the research discussed the three channels of involvement, which are “cause”, “contribute”, and “directly linked”. *Section V.B* explored the nexus between business enterprises and their non-employees. In the context of this research, this would be between sugar producers and subcontracted agricultural workers. The research consulted the labor laws in ASEAN countries and argued that the labor laws in some of these jurisdictions could be invoked to serve as a legal example for establishing the linkage, such as provisions extending the scope of employers’ obligations and liabilities for its non-employees based on certain conditions.

# Enhancing Effective Access to an Operational-level Grievance Mechanism: Addressing the Barriers

The existence of an operational-level grievance mechanism provides an additional platform for rights-holders whose human rights are affected by business-related adverse human rights impact to seek remedy. Coexisting with other grievance mechanisms – whether State-based or non-State-based, an operational-level grievance mechanism has certain advantages that distinguish it from other types of grievance mechanisms<sup>581</sup>. Essentially, business enterprises may be willing to establish an operational-level grievance mechanisms for the following reasons. First, having effective operational-level grievance mechanisms accessible by all rights-holder whose rights are infringed reflects a good, human rights-promoting corporate image, which is beneficial to fulfilling their corporate social responsibility (CSR). In today's world, a good corporate image or reputation is a highly important asset. Business enterprises with a good image tend to increase their worth and have a bigger competitive advantage<sup>582</sup>. Furthermore, consumers typically prefer business enterprises with a good reputation; therefore, the preferred business enterprises may be able to charge premium pricing over their competitors offering the same products or services, as well as

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<sup>581</sup> See Section II.C “Doing business responsibly – Creating effectiveness criteria for operational-level grievance mechanisms”

<sup>582</sup> Kim Harrison, *Why a good corporate reputation is important to your organization?* (Aug. 15, 2017, 8:05 AM) [http://www.cuttingedgepr.com/articles/corprep\\_important.asp](http://www.cuttingedgepr.com/articles/corprep_important.asp).

being the first-choice company for loyal consumers<sup>583</sup>. Regarded as one of the components of organizational reputation used in reputation measurement systems<sup>584</sup>, corporate social responsibility can be increased by providing operational-level grievance mechanisms. Second, resolving disputes using traditional means often requires the disclosure of information, which at times should rather be kept confidential. Usually hailed as the major advantage for alternative dispute resolution methods such as arbitration or mediation, protecting confidential business information and preventing business enterprises from reputational harm are also advantages that can be enjoyed when resolving disputes through an operational-level grievance mechanism.

In light of these potential reputational benefits, business enterprises are encouraged to provide an operational-level grievance mechanism for all rights-holders in the supply-chain, whose rights are infringed by adverse human rights impact that business enterprises have caused, contributed or been directly linked to. However, such mechanisms are typically limited to internal use. In other words, only employees of the business enterprises are eligible to submit complaints to an available operational-level grievance mechanism provided by their employer. In practice, as for example in the agricultural industry, where subcontracting work to external, non-employee (subcontracted) workers is the norm, subcontracted workers who perform this work are unaware of or excluded from the possibility of using an operational-level grievance mechanism provided by the business enterprise. To be more specific and avoid confusion, this research will employ the terms used in the sugar cane supply-chain to refer to different actors, namely sugar producers, subcontractors, subcontracted agricultural workers. An important question in this chapter is how to ensure that subcontracted agricultural workers can access to an operational-level grievance mechanism provided by sugar producers effectively.

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<sup>583</sup> Leon Bracey, *The importance of business reputation* (Aug. 15, 2017, 8:20 AM) <http://www.businessinfocusmagazine.com/2012/10/the-importance-of-business-reputation/>.

<sup>584</sup> *Id.*

Reciting the UNGP accessibility criteria, operational-level grievance mechanisms should be “being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access”<sup>585</sup>. The four-step structure thus becomes: (1) identifying intended users, (2) being known, (3) identifying potential barriers to access, and (4) providing adequate assistance<sup>586</sup>. As a result, the subsections in this chapter will follow this structure. Again, it must be reiterated that information and recommendations stated in this research are context specific to Thailand’s sugar industry.

## **A. PATH TO EFFECTIVE ACCESS – CRITERIA AND PRACTICES**

Principally, the establishing a nexus between grievances and victims of adverse human rights impact on the one end and business enterprises on the other end provides an essential ground for instigating a claim with regard to business-related human rights abuses. The previous chapter studied the establishment of linkage between business enterprises (sugar producers) and non-employee workers (subcontracted agricultural workers), whose legal relationship is not traditionally recognized due to the lack of a formal employment relationship. With the linkage, the next issue is to explore ways to ensure that affected subcontracted agricultural workers are provided with just remediation and have effective access to operational-level grievance mechanisms administered or operated by sugar producers. To start, this section explores the UNGP’s criteria on accessibility, as well as some existing practices that are currently in operation globally and individually.

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<sup>585</sup> U.N.G.P., *supra* note 3, Principle 31, at 33-35.

<sup>586</sup> *Id.*

## 1. UNGP's accessibility criteria revisited

Previously mentioned in *Section II.C.1*, the UNGP advocate for the availability of effective non-judicial grievance mechanisms as an alternative complementing the existing judicial grievance mechanisms. For this purpose, the UNGP provide a list of effective criteria for non-judicial grievance mechanisms, including operational-level grievance mechanisms. Reiterated again, the UNGP criteria suggest that effective non-judicial grievance mechanisms, both State-based and non-State-based should be<sup>587</sup>:

- (a) *Legitimate*: enabling trust from the shareholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) *Accessible*: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) *Predictable*: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) *Equitable*: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) *Transparent*: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) *Rights-compatible*: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) *A source of continuous learning*: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

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<sup>587</sup> U.N.G.P., *supra* note 3, Principle 31, at 33-35.

Operational-level mechanisms should also be:

- (h) *Based on engagement and dialogue*: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

While the criteria were proposed as a set and are arguably of equal importance<sup>588</sup>, this research only focuses on the “accessibility” criteria as the main subject of the study. While, the UNGP Commentary provides a brief explanation of how accessibility can be ensured<sup>589</sup>, this section attempts to interpret the application of the UNGP text in further details. From the text “being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access”, a textual categorization results in the four-step test: (1) identifying intended users, (2) being known, (3) identifying potential barriers to access, and (4) providing adequate assistance.

#### *a. Identifying intended users*

Fundamentally, people in a supply-chain whose rights are infringed should be equally eligible as users to seek remedy for admissible grievances that they encounter at the available operational-level grievance mechanisms<sup>590</sup>. However, the limited capacity of the administrative entity may necessitate the imposition of certain measures to prevent the overflow of cases that are beyond their capacity to handle. One such measure is to clearly identify who are the intended users. For operational-level grievance mechanisms, business enterprises tend to limit the scope of operation to internal use. As a result, the intended users are limited only to their employees. Non-employees, such as subcontracted agricultural workers, are not eligible to seek remedy at the internal operational-level grievance mechanism. Another such measure

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<sup>588</sup> RUGGIE, *supra* note 39, at 118-119.

<sup>589</sup> U.N.G.P., *supra* note 3, Commentary, at 34-35.

<sup>590</sup> See Section II.B “Importance of Pillar III – Ensuring the right to effective remedy for victims”.

is the limitation of the scope for eligible cases to only a few issues, such as wage payment. In some jurisdictions, this limitation has legal support; for instance, the Singapore Employment Act Section 65(1) limits the eligible claims only to the reimbursement of salary<sup>591</sup>. As a result, the intended users must be those impacted by a wage-related issue. Consequently, to ensure greater access to remedy, it is principally essential to expand the scope of intended users to include all potential victims impacted by all business-related human rights issues including subcontracted agricultural workers. This matter will be subsequently discussed in *Section VI.B*.

### ***b. Being known***

This requirement of knowledge is based on the perspective and understanding of the intended users – “all stakeholder groups for whose use they are intended” – not from the point of view of the business enterprises. To examine this requirement, references to the meaning of the term “known” must be illustrated.

The Oxford English Dictionary defines “known”, in the past participle form of “know”, as “recognized, familiar, or within the scope of knowledge”<sup>592</sup>. Furthermore, being “recognized” is being acknowledged of existence, validity, and legality<sup>593</sup>, whereas being “familiar” is being “well-known from long, close association”<sup>594</sup>. This cluster of definitions suggests that the ordinary meaning of “being known” is “a quality of being acknowledged, earned from long, close association”.

In light of the UNGP’s object and purpose, “being known” for a non-judicial grievance mechanism activates a two-step test. First, an intended

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<sup>591</sup> EMPLOYMENT ACT, *supra* note 541, art. 65(1).

<sup>592</sup> Oxford Dictionary, *Definition “know”* (Jul. 25, 2017, 8:10 AM), <https://en.oxforddictionaries.com/definition/know>.

<sup>593</sup> Oxford Dictionary, *Definition “recognize”* (Jul. 25, 2017, 8:45 AM), <https://en.oxforddictionaries.com/definition/recognize>.

<sup>594</sup> Oxford Dictionary, *Definition “familiar”* (Jul. 25, 2017, 10:15 AM), <https://en.oxforddictionaries.com/definition/familiar>.



user must acknowledge the existence of the non-judicial grievance mechanism. Second, such acknowledgement must derive from long, close association between the intended user and the entity administering the non-judicial grievance mechanism. For instance, the OECD Guidelines for Multinational Enterprises<sup>595</sup> (hereinafter “the OECD Guidelines”), which contain non-binding principles and standards for responsible business conduct<sup>596</sup>, stipulates that the National Contact Points (NCPs) are to make the OECD Guidelines known and available by appropriate means<sup>597</sup>. Their groups of intended users are relatively broad, ranging from business community, worker organizations, other non-governmental organizations, and other interested parties<sup>598</sup>. Having achieved the first step through the dissemination of the OECD Guidelines by the NCPs, the second step can be realized by establishing long, close associations through a series of fora for discussion and assistance<sup>599</sup>. Furthermore, such association can be strengthened when the UN Working Group introduced the Guidance on National Action Plans on Business and Human Rights<sup>600</sup> (hereinafter “the UN Guidance”) which advises Governments to consider adhering to the OECD Guidelines<sup>601</sup>. The development of the National Action Plans (NAPs) requires a format for engagement and consultation with non-governmental stakeholders<sup>602</sup> and the identification of priority areas<sup>603</sup>.

For an operational-level grievance mechanism it is crucial that its intended users have fundamental information of its existence. At the very least, the intended users must know to whom, how, and where they can

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<sup>595</sup> O.E.C.D., *supra* note 32.

<sup>596</sup> O.E.C.D., *supra* note 32, at 3.

<sup>597</sup> O.E.C.D., *supra* note 32, at 72.

<sup>598</sup> O.E.C.D., *supra* note 32.

<sup>599</sup> O.E.C.D., *supra* note 32.

<sup>600</sup> U.N. Working Group (2014), *Guidance on National Action Plans on Business and Human Rights*, [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf).

<sup>601</sup> *Id.*, Annex III “Non-exhaustive list of issues to consider including in NAPs”, at 18.

<sup>602</sup> *Id.*, Phase 1: initiation (4), at i.

<sup>603</sup> *Id.*, Phase 2: assessment and consultation (7), at i.

initiate a contact with the administration of the operational-level grievance mechanism. Moreover, they should be allowed to participate in the discussion during the establishment of the operational-level grievance mechanism, as this could initiate the start of a long, close association between them and the business enterprise. Also, participants who are involved from the beginning of its establishment are likely to acknowledge the outcome of the process that they were party to.

### ***c. Identifying potential barriers to access***

As discussed in Section II.C.2, access to operational-level grievance mechanisms may be prevented by several barriers. The UNGP identify the following factors as potential barriers to access: a lack of awareness of the mechanism, language, literacy, costs, physical location, and fear of reprisal<sup>604</sup>. The Harvard Kennedy School Working Paper also identifies restrictions based on membership, resource-intensive and costly procedure, and additional measures to limit the number of incoming case filings as examples of potential barriers to access<sup>605</sup>. It is, therefore, the task of the creator of a non-judicial grievance mechanism to explore potential barriers and implement relevant measures to prevent them. Further discussion on barriers to access will be provided in *Section VI.D*.

### ***d. Providing adequate assistance***

This last requirement imposes a responsibility onto the administrator of non-judicial grievance mechanisms to provide intended users, especially those who may face particular barriers to access, with adequate assistance. Being “adequate” means “being satisfactory or acceptable in quantity or quality”<sup>606</sup>, and this requirement tends to be evaluated against

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<sup>604</sup> U.N.G.P., *supra* note 3, Commentary Principle 31, at 33-35.

<sup>605</sup> Rees, *supra* note 171.

<sup>606</sup> Oxford Dictionary, *Definition “adequate”* (Jul. 25, 2017, 4:20 PM), <https://en.oxforddictionaries.com/definition/adequate>.

the perception of the intended users. As such, the administrator can provide assistance to the impacted users in any manner that it deems appropriate, but, only if such assistance is provided to the extent that the impacted users are satisfied or accept it, can such assistance be seen as adequate. From this interpretation, it seems that the UNGP impose a relatively high threshold of responsibility on the administrator and equip the impacted users with a rather subjective evaluation power. To mitigate this subjective nature, opting to use the standard of an average reasonable person would be helpful<sup>607</sup>. Consequently, to provide adequate assistance to intended users, who may face particular barriers to access, the administrator should first identify potential barriers and the impacted users, and provide necessary assistance that can eradicate such barriers to the extent that an average reasonable person would be satisfied or accept it.

## **2. Facilitating accessibility as seen in the current practice**

Non-judicial grievance mechanisms have also been in operation alongside the judicial grievance mechanisms. Whether developed for global or internal use or administered by a State agency or a private institution, several non-judicial grievance mechanisms set an exemplary benchmark for the subsequent development of future non-judicial grievance mechanisms. In fact, the OHCHR recognizes the importance of non-judicial grievance mechanisms and published a scoping paper as part of its Accountability and Remedy Project II<sup>608</sup> (hereinafter referred

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<sup>607</sup> John Gardner, *The Many Faces of the Reasonable Person* (Jul. 27, 2017, 9 AM)

[http://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf).

<sup>608</sup> U.N. OHCHR, *Access to Remedy for Business-related Human Rights Abuses: A scoping paper on State-based non-judicial mechanisms relevant for the respect by business enterprises for human rights: current issues, practices and challenges* (Oct. 20, 2017, 9 AM), [https://business-humanrights.org/sites/default/files/images/ARPII\\_FINAL%20Scoping%20Paper.pdf](https://business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf).

to as “the Scoping Paper”). The focus of the Scoping Paper, entitled “Access to Remedy for Business-related Human Rights Abuses”, is on State-based non-judicial mechanisms. Recently released in February 2017, the Scoping Paper provides a preliminary assessment of current practices and challenges regarding the use of State-based non-judicial grievance mechanisms<sup>609</sup>. Despite being focused on State-based non-judicial grievance mechanisms, information contained in the Scoping Paper is also beneficial to the study of non-State-based grievance mechanisms, especially operational-level grievance mechanisms. This subsection explores some dominant non-judicial grievance mechanisms in relation to business and human rights and specifically discusses the facilitation of their accessibility. This research explores some prominent examples of non-judicial grievance mechanisms both at the international and operational level.

### *a. International practice*

The operations of some non-judicial grievance mechanisms are centralized. That is, whenever and wherever a claim is filed, it proceeds directly to the central body, which is then tasked to review, examine, investigate, report, and, if mandated, give recommendations. Existing non-judicial grievance mechanisms operated by the Organization for Economic Cooperation and Development (OECD) or the World Bank Inspection Panel (WBIP) provide examples for this type of grievance mechanisms.

#### *i. OECD’s National Contact Points*

The OECD National Contact Points (NCPs) are a prime example for the centralized operation of non-judicial grievance mechanisms. Considered as a State-based operation, the NCPs are in fact agencies established by adhering governments to promote and implement the OECD

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<sup>609</sup> *Id.*, at 2.

Guidelines<sup>610</sup>, by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the OECD Guidelines<sup>611</sup>. They are to operate “in accordance with criteria of visibility, accessibility, transparency and accountability”<sup>612</sup>. The OECD is relatively flexible with regard to the composition of the NCPs, while insisting on the fundamental goal of providing “an effective basis” for dealing with issues in the OECD Guidelines and developing and maintaining relations with business community, worker organizations and other interested parties<sup>613</sup>.

One of the many roles of the NCPs is straightforward; the NCPs are tasked to contribute to the resolution of issues arising from the implementation of the OECD Guidelines<sup>614</sup>. As a centralized operation, issues are to be reported directly to the NCPs. From making an initial assessment and seeking consultations with various sources to issuing statements or reports on the matter to the public, the NCPs must perform their conduct in a manner that is “impartial, predictable, equitable and compatible with the principles and standards of the OECD Guidelines”<sup>615</sup>.

Aside from the main role of contributing to the resolution of issues, the NCPs are required to ensure the accessibility of their mechanisms to the public at large, relevant stakeholders and other interested parties. Assessing against the UNGP accessibility criteria, the NCPs strive to make their mechanisms more effectively accessible in the following manner:

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<sup>610</sup> O.E.C.D., *supra* note 32, at 3.

<sup>611</sup> O.E.C.D., *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015* (Oct. 10, 2017, 8:20 AM), <http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>.

<sup>612</sup> *Id.*, at 71

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*, at 72.

<sup>615</sup> *Id.*

**Identifying intended users** – The NCPs identify that their intended users span across a broad range of stakeholders. Evidently, they seek the active support of “social partners including the business community, worker organizations, other non-governmental organizations and other interested parties”<sup>616</sup>. The NCPs are required to deal with issues raised by these intended users “in an efficient and timely manner” and “in accordance with applicable law”<sup>617</sup>.

**Being known** – As previously mentioned, the NCPs strive to make the OECD Guidelines known and available by appropriate means, which include disseminating the OECD Guidelines through on-line information and in various national languages<sup>618</sup>. Already, the English and French language versions of the OECD Guidelines are provided on the OECD website<sup>619</sup>. In addition, to increase awareness and acknowledgment through establishing long, close association with intended users, the NCPs are tasked to cooperate with a wide variety of organizations and individuals<sup>620</sup>. Specifically mentioned in the Commentary, the NCPs are required to communicate and respond to legitimate inquiries made by other NCPs from other adhering governments, business communities, worker organizations, other non-governmental organizations, the public, and governments of non-adhering countries<sup>621</sup>. Also contributing to making the NCPs known is the requirement to make the results of the NCPs procedures publicly available, provided that such disclosure protect sensitive information of business and other stakeholders<sup>622</sup>.

**Identifying potential barriers to access** – The OECD Guidelines implicitly identify potential barriers to access throughout the Commentary. For instance, the OECD Guidelines recognize potential obstacles that may arise from issues concerning activities taking place in

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<sup>616</sup> *Id.*, at 71.

<sup>617</sup> *Id.*, at 72.

<sup>618</sup> *Id.*

<sup>619</sup> *Id.*, Commentary 14, at 80.

<sup>620</sup> *Id.*, Commentary 16, at 80.

<sup>621</sup> *Id.*, Commentary 17, at 80.

<sup>622</sup> *Id.*, at 73.

several adhering countries<sup>623</sup>. When this occurs, it is inevitable to engage the NCPs from all these countries, and a strong cooperation, which may be fostered through consistent joint peer learning activities<sup>624</sup>, may mitigate the impact of this barrier. Furthermore, the potential release of sensitive business information may be a strong barrier preventing business enterprises from engaging in the NCPs process. To address this potential barrier, the NCPs are required to take appropriate steps to protect sensitive business information, as well as sensitive individual information such as the identity of victims<sup>625</sup>.

**Providing adequate assistance** – To empower trust in the mechanism, the NCPs employ the principle of “good offices” in their discussions and collaboration with the parties involved<sup>626</sup>. The “good offices” practice includes seeking valuable advice from relevant authorities and stakeholders. The NCPs also assist parties involved by facilitating access to consensual and non-adversarial procedures upon common agreement between both parties. Such procedures may include mediation and conciliation<sup>627</sup>. Protection of identity is also facilitated, as the disclosure of identity may be detrimental to the parties involved<sup>628</sup>. Generally, the NCPs are required to provide assistance to the parties in as many aspects as they see appropriate.

## *ii. The World Bank Inspection Panel*

Another example of a centralized operation of non-judicial grievance mechanism is the World Bank Inspection Panel (WBIP). Unlike the NCPs, the WBIP is operated by an independent body created by the World Bank Board of Executive Directors<sup>629</sup> and is, therefore, a non-

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<sup>623</sup> *Id.*, Commentary 24, at 82.

<sup>624</sup> *Id.*, Commentary 19, at 81.

<sup>625</sup> *Id.*, Commentary 38, at 85.

<sup>626</sup> *Id.*, Commentary 28, at 83.

<sup>627</sup> *Id.*, Commentary 29, at 84.

<sup>628</sup> *Id.*, Commentary 30, at 84.

<sup>629</sup> The World Bank, *How to file a request for inspection to the World Bank Inspection Panel: General Guideline* (Jul. 29, 2017, 10:30 AM)

State-based operation. The main purpose of the WBIP is to promote accountability at the World Bank by ensuring that its operations in various Bank-funded projects duly follow the World Bank's operational policies and procedures<sup>630</sup>. In brief, the WBIP receives a complaint, termed "Request for Inspection", from eligible requestors. The Request for Inspection must illustrate the harm, the project in question, the action or omission by the Bank, and the prior steps taken to inform the Bank of such harm<sup>631</sup>. Once the WBIP concludes the inspection, it reports the findings to the Board on whether an action or omission resulting from a particular Bank-funded project causes or contributes to the harm as alleged by the requestors, and whether such action or omission totally or partially results from the failure of the World Bank to comply with its operational policies and procedures<sup>632</sup>. To ensure that the requestors have access to the grievance mechanism, the WBIP outlines several channels and procedures. They somewhat mirror the UNGP accessibility criteria in the following manner:

**Identifying intended users** – As previously mentioned, the WBIP targets the parties who are adversely affected by Bank-funded projects. Referred to as "requestors", they can be any group of two or more people adversely affected by the Bank-funded project, a duly appointed local representative or a foreign representative acting on explicit instructions as the agent of adversely affected people, or an Executive Director of the Bank in special cases of serious alleged violations of the World Bank's policies and procedures<sup>633</sup>. Moreover, the WBIP only has competence to inspect Bank-funded projects, which are projects financed by the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) of the World Bank Group, as well as Trust Funds managed by the World Bank<sup>634</sup>.

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[http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines\\_How%20to%20File\\_for\\_web.pdf](http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines_How%20to%20File_for_web.pdf).

<sup>630</sup> *Id.*, at 1.

<sup>631</sup> *Id.*, at 3.

<sup>632</sup> *Id.*, at 1.

<sup>633</sup> *Id.*, at 2.

<sup>634</sup> *Id.*, at 1.



**Being known** – The existence of the WBIP is made publicly known on the World Bank’s website<sup>635</sup> as well as on paper in several World Bank-issued documents. Also provided on the website are the guidelines to use the WBIP, including where, when and how to contact it.

**Identifying potential barriers to access** – The WBIP also implicitly identifies potential barriers to access throughout its guidelines. Such barriers include the language barrier, lack of legal writing experience, fear of identity disclosure, and no access to online facilities.

**Providing adequate assistance** – The WBIP provides various forms of assistance to requestors who may face barriers to access. First, the WBIP does not require a specific format for writing a Request for Inspection. However, it provides a suggested format<sup>636</sup> for requestors, whose legal writing experience may be lacking or limited, to use. Second, the WBIP allows the Request for Inspection to be submitted in the requestors’ local language to accommodate requestors who lack or have limited English language competency<sup>637</sup>. Third, the WBIP assures the requestors that their identity shall be kept confidential, provided they express this request along with the Request for Inspection<sup>638</sup>. Lastly, the WBIP provides several channels to which the requestors may submit a Request for Inspection. Online submission is encouraged due to its expedited nature. Furthermore, the hard-copy version can be sent to the Executive Secretary of the Inspection Panel in Washington, D.C., or alternatively to the World Bank’s local office in the country where the Bank-funded project is located, in order to avoid high postage costs<sup>639</sup>.

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<sup>635</sup> The World Bank, *How to file a request for inspection: Scope and Mandate* (Jul. 29, 2017, 10:50 AM)

<http://ewebapps.worldbank.org/apps/ip/Pages/FileaRequest.aspx>.

<sup>636</sup> *Id.*, at 4-5.

<sup>637</sup> *Id.*, at 3.

<sup>638</sup> *Id.*, at 4.

<sup>639</sup> *Id.*

## ***b. Fledgling operational-level grievance mechanisms***

Information on access to operational-level grievance mechanisms is limited and often kept internally. While this may hinder the study of the subject, several academic researches have attempted to provide as much information as was available. At the time of writing, there was no information on operational-level grievance mechanisms in any agricultural industry publicly available or accessible. Therefore, examples provided or mentioned in this research in order to illustrate the current practice are taken from certain operational-level grievance mechanisms in other industries, as this information was publicly accessible.

### *i. Hewlett-Packard (HP) and Center for Reflection and Action on Labor Issues (CEREAL)*

The Center for Reflection and Action on Labor Issues (CEREAL) is a Mexican NGO that provides an operational-level grievance mechanism on labor-related issues. Previously exclusive to Hewlett-Packard (HP) company workers, the CEREAL can now be accessed publicly<sup>640</sup>. Mandated to resolve labor-related issues, the CEREAL serves as the first point of contact for HP workers, including subcontracted workers, whose attempts to communicate and resolve the issues with their Union or direct employers have been unsuccessful<sup>641</sup>. The CEREAL then undertakes the necessary investigation and directly engages with the factory management. If there is neither immediate resolution nor direct agreement reached, the CEREAL can bring the issue forward to the Mexican Chamber of the Electronics Industry (CANIETI). If there is no

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<sup>640</sup> Caroline Rees and David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena*, in CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, (Cambridge, MA: John F Kennedy School of Government. Harvard University, 2008), at 17.

<sup>641</sup> *Id.*

satisfactory outcome at the CANIETI, the brand company that uses the service of the factory in question will then be notified. When a legitimate grievance remains unresolved, the brand company will be asked to withdraw from using the service of the factory in question<sup>642</sup>.

As far as the accessibility is concerned, any worker can instigate a claim or register a grievance at the CEREAL. To embed awareness of its existence, the CEREAL provides regular training on labor-related rights to the electronic sector. It also provides free advice and represents workers to the factory management in order to prevent potential financial barriers to access. Also, the identity of workers participating in the CEREAL process will be kept confidential<sup>643</sup>.

*ii. Gap Inc.*

Gap Inc. (Gap) provides a guideline to its factories to establish their own grievance mechanisms, as well as conducting training for personnel managers responsible for the implementation<sup>644</sup>. The Union can instigate a claim on the workers' behalf to Gap's Social Responsibility Manager for the region, in which the factory is located. If the case cannot be resolved, procedures including investigations by immediate supervisors, departmental manager and company manager follow respectively in line with the provided guideline<sup>645</sup>. The decision of the company manager is final, and dissatisfied claimants can bring the case further to other external legal channels in their respective country.

With regard to accessibility, Gap designates the Social Responsibility Manager as the main contact point for receiving claims. However, when possible, a direct verbal engagement between workers and their employers or the management to resolve the dispute is encouraged<sup>646</sup>.

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<sup>642</sup> *Id.*, at 18.

<sup>643</sup> *Id.*, at 17.

<sup>644</sup> *Id.*, at 11.

<sup>645</sup> *Id.*, at 13-14.

<sup>646</sup> *Id.*, at 13.

### iii. *Siemens AG*

Siemens releases the “Siemens Business Conduct Guidelines”, which generally cover principles concerning respect for human rights of the employees<sup>647</sup>. Reflecting various international standards found, for instance, in the UN and the ILO documents, the Siemens Business Conduct Guidelines require suppliers to respect the employment rights of their employees, including paying fair remuneration with minimum wage guaranteed and ensuring the right of employees to join a trade union<sup>648</sup>. To monitor compliance, Siemens installs a reporting system consisting of several channels to which the employees can lodge complaints. For instance, employees can use the hotline “Tell Us” by telephone or the Internet to file complaints anonymously<sup>649</sup>. Alternatively, employees can opt to file complaints to an external ombudsperson<sup>650</sup>.

With regard to accessibility, Siemens has implemented various measures to improve access to its existing reporting channels. To reduce language barriers, the hotline is made available in 13 languages to accommodate the possibly limited language skills of some employees<sup>651</sup>. Furthermore, it can be accessed at any time, and does not use Siemens intranet in order to protect confidentiality and prevent possible intervention<sup>652</sup>.

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<sup>647</sup> Siemens, *Siemens Business Conduct Guidelines* (Jul. 30, 2017, 5 PM) [https://www.siemens.com/about/sustainability/pool/cr-framework/business\\_conduct\\_guidelines\\_e.pdf](https://www.siemens.com/about/sustainability/pool/cr-framework/business_conduct_guidelines_e.pdf), at A.1 and A.2.

<sup>648</sup> Julia Planitzer, *Siemens AG*, in HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIER TO ACCESS 87 (Juan José Álvarez Rubio and Katerina Yiannibas, 1<sup>st</sup> ed., 2017).

<sup>649</sup> Siemens, *Channels for Reporting Misconduct* (Jul. 31, 2017, 8 AM) <https://www.siemens.com/global/en/home/company/sustainability/compliance/reporting-channels.html>.

<sup>650</sup> *Id.*

<sup>651</sup> *Id.*

<sup>652</sup> *Id.*

## **B. SCOPING THE ELIGIBILITY – IDENTIFYING ELIGIBLE INTENDED USERS AND ADMISSIBLE GRIEVANCES**

Having examined the UNGP accessibility criteria and explored current practice on accessibility based on two prominent non-judicial grievance mechanisms – the OECD and the WBIP, as well as selected operational-level grievance mechanisms, this section will be dedicated to addressing an important issue that could enhance accessibility to operational-level grievance mechanisms: the scope of eligible intended users and admissible grievances. Addressing the scope of an operational-level grievance mechanism is an important task, when designing and ensuring effective access to such mechanism. Ideally, on the personal scope, all rights-holders in the supply-chain, whose rights are infringed, should be eligible users and have the right to access the operational-level grievance mechanism provided by a sugar producer. This should effectively include subcontracted agricultural workers who perform works, though directly under the employment relationship with subcontractors, for the benefit of sugar producers. On the material scope, the types of issues to be admissible to the operational-level grievance mechanism should be clearly defined. Defining both types of scope facilitates the access to the operational-level grievance mechanism, as it assists the decision-making process for subcontracted agricultural workers on whether to file a complaint at the operational-level grievance mechanism or not. This also benefits sugar producers. Having a clear scope could expedite the processes of the operational-level grievance mechanism by filtering out unwarranted, inappropriate, or inadmissible claims. Consequently, this subsection will discuss the aspects concerning the definition of both personal and material scopes that would optimize the access of subcontracted agricultural workers to operational-level grievance mechanisms.

### **1. Defining personal scope – Subcontracted agricultural workers as eligible complainants**

In most operational-level grievance mechanisms, only the employees of the business enterprise that administers the mechanism are eligible to file

complaints, as it is regarded as an internal mechanism for complainants having formal employment relationship. As such, the employees of the sugar producer that administers an operational-level grievance mechanism are eligible to file complaints. However, in a world of supply-chain and outsourcing, rights-holders whose rights are infringed could potentially encompass non-employees of the sugar producers. As such, subcontracted agricultural workers should be eligible complainants. Additionally, potential complainants can also be other affected individuals or local communities collectively, or could be extended to include other groups such as NGOs and trade unions<sup>653</sup>, as well as for other vulnerable or marginalized individuals<sup>654</sup>. The list of potential complainants must be clearly defined in order to prevent undue proliferation. In this research, the focus is limited to subcontracted agricultural workers.

For subcontracted agricultural workers in Thailand to become eligible complainants, there are two supporting perspectives. First, subcontracted agricultural workers can already be viewed as “by-law” employees of a sugar producer. Under the current definition of “employer” in the LPA<sup>655</sup>, a sugar producer that has subcontracted out the work of harvesting sugar canes to subcontractors is deemed to be the employer of the subcontracted agricultural workers. With this perspective, an operational-level grievance mechanism provided by the sugar producer would remain an internal mechanism. As “by-law” employees, subcontracted agricultural workers are already eligible to file claims to the operational-level grievance mechanism provided by the sugar producer. Second, the sugar producer can opt for the extension of eligibility to subcontracted agricultural workers as a voluntary gesture. This option seems to be preferred by the sugar producers as it supports and materializes their CSR initiatives. As subcontracted agricultural

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<sup>653</sup> Shift, *Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights*, New York, 2014, at 19.

<sup>654</sup> Institute for Human Rights and Business, *Remediation and Operational-level Grievance Mechanism* (Oct. 10, 2017, 1 PM), [https://www.ihrb.org/uploads/reports/EC-Guide\\_OG-12\\_Part-3\\_Section-VI.pdf](https://www.ihrb.org/uploads/reports/EC-Guide_OG-12_Part-3_Section-VI.pdf).

<sup>655</sup> LABOR PROTECTION ACT, *supra* note 230, art. 5 para 1(1), 5 para 1(2).

workers are often viewed as vulnerable and marginalized actors in the supply-chain, they may be disempowered from or in doubt about raising complaints. Assuring their eligibility to the operational-level grievance mechanism could empower them to speak up for themselves and voice their concerns or grievances, which could potentially lead to the mitigation or future reduction of adverse human rights impacts in the supply-chain. Also under this aspect, the sugar producers could avoid being “too closely associated with” subcontracted agricultural workers to the degree that the public could mistakenly perceive them as the human rights violators and it could potentially affect their corporate image and reputation<sup>656</sup>.

Another consideration is whether to restrict the type of complainants to individuals, or alternatively allow collective complaints. In the sugar producers’ view, there is not much difference between the two types in terms of administration<sup>657</sup>. Collective complaints can expedite the dispute resolution and lessen the administrative burden by having potentially fewer numbers of complaints arising from the same cause. Moreover, filing complaints collectively could become a useful strategy. In addition to potentially reducing resolution cost for each individual complainant<sup>658</sup>, it indicates or emphasizes the greater gravity of the situation, prompting the expedition of dispute resolution. Although not entirely comparable to the context of this research due to the differences in geographical location and type of industry, the case of unions and workers in various economic sectors in Colombia filing claims collectively against their employers at the Colombian Ministry of Labor illustrates the magnitude of a collective complaints strategy. The results of these collective complaints receive more immediate responses from the relevant authorities, which are known for being inefficient and delaying the process<sup>659</sup>.

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<sup>656</sup> Interview with representatives from the Mitr Phol Group, in Bangkok.

<sup>657</sup> *Id.*

<sup>658</sup> U.N. OHCHR, *supra* note 608, at 38.

<sup>659</sup> Building and Wood Workers’ International, *Colombia: Massive complaints against outsourcing and the collective ‘pacts’* (Oct. 11, 2017, 8:30 AM), <https://www.bwint.org/cms/news-72/colombia-massive-complaints-against-outsourcing-and-the-collective-pacts-831>.

## 2. Defining material scope – Screening admissible grievances

As previously discussed in Chapter IV, grievances can vary from a minor discomfort to a human rights violation based on internationally recognized human rights instruments. For an operational-level grievance mechanism to be in line with the UNGP, references must be made to internationally recognized human rights – “understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work”<sup>660</sup>. Therefore, an UNGP-complying operational-level grievance mechanism must have a clearly defined material scope that reflects the above instruments affirmed by the UNGP. Siemens AG, for instance, developed the “Siemens Business Conduct Guidelines” that make clear reference to the International Bill of Human Rights and the ILO Declaration<sup>661</sup>, as well as other documents such as the OECD Guidelines for Multinational Enterprises<sup>662</sup>, the UN Global Compact<sup>663</sup>, and the Agenda 21 on Sustainable Development<sup>664</sup>. Actors in the Siemens’ supply-chain are expected to comply with the Siemens Business Conduct Guidelines, and non-compliance is a ground to file complaints<sup>665</sup>. Likewise, Statoil also directly references the UNGP, particularly the International Bill of Human Rights and the ILO Declaration, in its stand-alone human rights policy<sup>666</sup>. To operationalize

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<sup>660</sup> U.N.G.P., *supra* note 3, Principle 12, at 13-14.

<sup>661</sup> Siemens, *supra* note 647, at 42.

<sup>662</sup> O.E.C.D., *supra* note 32.

<sup>663</sup> U.N. Global Compact, *supra* note 31.

<sup>664</sup> U.N. Sustainable Development, *United Nations Conference on Environment and Development in Rio de Janeiro Agenda 21* (Oct. 1, 2017, 9:30 AM), <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

<sup>665</sup> Planitzer, *supra* note 648, at 88.

<sup>666</sup> Statoil, *Human Rights Policy September 2015* (Oct. 11, 2017, 10:25 AM), [https://www.statoil.com/content/dam/statoil/documents/sustainability-reports/human-rights-policy/Statoil%20Human%20Rights%20Policy\\_5012016.pdf](https://www.statoil.com/content/dam/statoil/documents/sustainability-reports/human-rights-policy/Statoil%20Human%20Rights%20Policy_5012016.pdf).



its human rights policy, Statoil established the Human Rights Steering Committee in 2015 to oversee the development and implementation of its human rights policy, as well as exploring Statoil's responses to human rights-related cases linked to its business operation and its human rights policy. Non-compliance with the human rights policy is a ground to file complaints to its operational-level grievance mechanism. H&M also makes direct reference to the UNGP, the International Bill of Human Rights and the ILO Declaration, as well as other international human rights documents in its human rights policy<sup>667</sup>. Samsung specifically mentions the UNGP, the "international human rights principles and standards set for in the UDHR", and the ILO Declaration in its Migrant Worker Guidelines<sup>668</sup>. The practices at Siemens, Statoil, H&M and Samsung are examples of human rights policies and illustrate definitions of material scope that clearly comply with the UNGP.

While defining the material scope in line with the UNGP is encouraged, other business enterprises have adopted a variety of approaches to make reference to internationally recognized human rights, when defining the material scope for their respective operational-level grievance mechanisms. Nestlé, for instance, references specific ILO Conventions, in addition to the general reference to "all human rights, including labor rights" in its Supplier Code<sup>669</sup>. Among the specifically-mentioned ILO Conventions are C029 and C105 (on forced labor), C139 and C182 (on child labor), and C111 (on fair and equal treatment). Inditex, a clothing company that owns many famous clothing brands such as Zara, Massimo Dutti, Bershka, and Pull&Bear, defines minimum standards of ethical and responsible behavior required to be met by its manufacturers and

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<sup>667</sup> H&M, *Human Rights Policy* (Oct. 11, 2017, 10:45 AM), <http://sustainability.hm.com/en/sustainability/downloads-resources/policies/policies/human-rights-policy.html>.

<sup>668</sup> Samsung, *Migrant Worker Guidelines* (Version 1.0, Dec. 2016) (Oct. 11, 2017, 11:30 AM),

[http://www.samsung.com/us/aboutsamsung/sustainability/sustainablemanagement/download/Samsung\\_Migrant\\_Worker\\_Guidelines.pdf](http://www.samsung.com/us/aboutsamsung/sustainability/sustainablemanagement/download/Samsung_Migrant_Worker_Guidelines.pdf).

<sup>669</sup> Nestlé, Supplier Code (Oct. 11, 2017, 12:15 PM),

<https://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf>, at 2.

suppliers in its supply-chain in its Inditex Code of Conduct. Instead of referring to any specific international human rights documents, Inditex lists a number of human rights that all actors in its supply-chain must respect. Among the listed human rights are no forced labor, no child labor, no discrimination, safe and hygienic working conditions, and assurance of remuneration, among others<sup>670</sup>.

However, references to human rights are sometimes made in a rather subtle manner. For instance, the Egyptian Refining Company grievance mechanism states that it may receive complaints “such as those about local hiring, environmental concerns (e.g. air quality, noise, and traffic congestion), unfulfilled expectations regarding employment and procurement/sale of goods, opportunities, and infrastructure damage”<sup>671</sup> without specific reference to any sources from international human rights instruments. Alternatively, some operational-level grievance mechanisms may opt for the more expansive approach. In other words, they do not specify which human rights issues are within the scope of their operational-level grievance mechanism. Rather, they accord discretionary power to the screening committee to decide on the admissibility of each issue. For instance, the Chevron Myanmar Grievance Mechanism Procedure clearly states that “there are no restrictions on the type of issue a stakeholder can raise under this procedure”. To determine the admissible issues, the screening committee “reserves the right not to address a complaint which it reasonably considers amounts to no more than general, unspecified, and therefore un-actionable dissatisfaction with the company, is otherwise malicious in nature, or concerns a matter for which the company has no formal responsibility”<sup>672</sup>. Interestingly, the screening categories used by the

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<sup>670</sup> Inditex, *Code of Conduct* (Oct. 11, 2017, 10:55 AM), <https://drive.google.com/file/d/0By0EQCTysR-VN3huTGM3M3c1U00/view>.

<sup>671</sup> Egyptian Refinery Company, *Grievance Mechanism* (Oct. 11, 2017, 2:10 PM), [http://www.ercegypt.com/files/ESIA/Grievance%20Mechanism\[1\].pdf](http://www.ercegypt.com/files/ESIA/Grievance%20Mechanism[1].pdf), at 7.

<sup>672</sup> Chevron Myanmar, *Grievance Mechanism Procedure – Policy, Government and Public Affairs* (Oct. 11, 2017, 4 PM), <https://www.chevron.com/-/media/chevron/worldwide/documents/myanmar-grievance-mechanism.pdf>, at 2.

Chevron Myanmar Grievance Mechanism Procedure are divided into three levels, based on the potential impacts on Chevron Myanmar's reputation. Issues categorized as Level 1 are those, for which answers can be provided immediately or have previously been approved by the management. Level 2 refers to one-time situation grievances, for which the screening committee determines that they will not impact Chevron Myanmar's reputation, whereas Level 3 refers to recurring, widespread or high-profile grievances that may result in a negative impact on Chevron Myanmar's business activities and/or reputation, such as the breach of Chevron Myanmar's policy or Myanmar law<sup>673</sup>.

Whichever approach operational-level grievance mechanisms may adopt, scoping admissible issues with direct and express references to the UNGP, the International Bill of Human Rights and the ILO Declaration is recommended. This would not only streamline the material scope of most, if not all, operational-level grievance mechanisms, it would also provide certainty, consistency, and, in effect, extension of the material scope beyond the legal basis found in several jurisdictions. For instance, Thai sugar producers would only be required by the Thai LPA to be liable for the non-provision of benefits and welfare for subcontracted agricultural workers, if they provides such benefits and welfare to their own employees working under a similar job description<sup>674</sup>. An operational-level grievance mechanism provided by a Thai sugar producer may have its material scope limited only to what it is liable for under the LPA. Technically, if the sugar producer does not employ any agricultural workers, it would result in it not having any responsibility to provide benefits and welfare to subcontracted agricultural workers either. Thus, the sugar producer could dismiss any claims by subcontracted agricultural workers relating to the non-provision of benefits and welfare. The sugar producer may also dismiss such claims even when the subcontractors do not provide benefits and welfare, and this decision-making is purely discretionary. On the other hand, if the material scope of the operational-level grievance mechanism mirrors that of the UNGP, the Thai sugar producers would have to accept the claim of non-provision of benefits and welfare as admissible, even though they themselves did

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<sup>673</sup> *Id.*, at 6.

<sup>674</sup> LABOR PROTECTION ACT, *supra* note 230, art. 11/1 para. 2.

not employ any agricultural workers, since the non-provision is attributed to its subcontractors. Consequently, an operational-level grievance whose material scope mirrors that of the UNGP can enhance accessibility for subcontracted agricultural workers, as it extends the admissibility of claims beyond the legal limitations.

### **C. BUILDING AWARENESS – MAKING AN OPERATIONAL-LEVEL GRIEVANCE MECHANISM KNOWN TO SUBCONTRACTED AGRICULTURAL WORKERS**

In addition to the appropriate definition of personal and material scopes, the accessibility of an operational-level grievance mechanism can be greatly improved by building greater awareness among its intended users – in this case the subcontracted agricultural workers. Evidently, an operational-level grievance mechanism that is well known among its intended users is more likely to be utilized. As discussed, “being known” is a quality of being acknowledged, earned from long, close association<sup>675</sup>. Therefore, in this context, subcontracted agricultural workers must acknowledge the existence of the operational-level grievance mechanism provided by the sugar producers, and such acknowledgement must derive from long, close association between them. To promote or empower the acknowledgement of the operational-level grievance mechanism among subcontracted agricultural workers, two important issues need to be addressed. First, the sugar producers need to ensure the effective dissemination of information regarding its operational-level grievance mechanism, particularly by selecting appropriate methods and ensuring comprehension of subcontracted agricultural workers. Second, the sugar producers must establish long, close association with subcontracted agricultural workers and potentially engage them in the design stage of the operational-level grievance mechanism. Further details on these issues are provided in the following subsections.

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<sup>675</sup> See Section VI.A.1.b “Being known”.

## 1. Dissemination of information

Clearly, the ultimate objective of disseminating information regarding the existence of an operational-level grievance mechanism is to ensure that subcontracted agricultural workers acknowledge it. Moreover, mere acknowledgement is insufficient without the assurance of their comprehension. Therefore, this subsection will explore several methods that could be used to disseminate such information, as well as ways to ensure the comprehension of subcontracted agricultural workers regarding the existence of the operational-level grievance mechanism.

### *a. Methods of dissemination*

Methods to disseminate the information on the existence of operational-level grievance mechanisms can range from having a small bulletin posted at sugar cane plantations to conducting various organized trainings. The key issue here is the practicality and appropriateness of each potential methods. This subsection explores different methods that are used in practice by a variety of existing operational-level grievance mechanisms.

#### *i. Human Rights Policy*

At the broadest scale, disseminating the information on the existence of an operational-level grievance mechanism can be done by the promulgation of a company-wide human rights policy or sustainability report, whereby business enterprises expect all its actors in their supply-chain, especially the subcontractors or the suppliers, to be fully aware of the company's commitment to ensure the protection of human rights<sup>676</sup>. Typically, a company-wide human rights policy contains a section on the existence and availability of an operational-level grievance mechanism, along with information on how the intended users can access it. For

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<sup>676</sup> For instance, see Planitzer, *supra* note 648, at 87.

instance, Siemens includes this information in its “G. Complaint and comment” section of the Siemens Business Conduct Guidelines<sup>677</sup> and clearly provides information on reporting channels. Likewise, Statoil highlights the availability of its operational-level grievance mechanism in its Sustainability Report<sup>678</sup> and provides information on reporting channels in its “Reporting and handling concerns” section<sup>679</sup>. Mitr Phol Corp. also utilizes this approach and states the availability of an operational-level grievance mechanism in its Sustainability Report<sup>680</sup>. Consistently, business enterprises that provide operational-level grievance mechanisms, such as H&M and Inditex, utilize their human rights policy and/or their sustainability report as the primary method of disseminating the information on the existence and availability of their operational-level grievance mechanisms.

## *ii. Subcontractors/Suppliers Guide*

In addition to using a company-wide human rights policy, some business enterprises create their version of supplier-level guidelines to protect human rights and disseminate the information on the availability of operational-level grievance mechanisms. For instance, Coca Cola introduced a “Supplier Guiding Principles” to communicate Coca Cola’s values and expectations<sup>681</sup>. As part of the contractual agreements between Coca Cola and its suppliers, the Supplier Guiding Principles list human rights values and expectations that its suppliers must follow and communicate to their employees, which include the elimination of discrimination, the prohibition of forced or abused labor, the provision of a safe and healthy working place, and the availability of a grievance

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<sup>677</sup> Siemens, *supra* note 647, at 38.

<sup>678</sup> Statoil, *supra* note 666, at 37.

<sup>679</sup> Statoil, *supra* note 666, at 44.

<sup>680</sup> Mitr Phol, *supra* note 293, at 18.

<sup>681</sup> Coca Cola, *Suppliers Guiding Principles* (Oct. 11, 2017, 5:20 PM),

[http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/unknown/unknown/SGP\\_Brochure\\_ENG.pdf](http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/unknown/unknown/SGP_Brochure_ENG.pdf).

mechanism<sup>682</sup>. In effect, Coca Cola uses its suppliers to disseminate information on the availability of operational-level grievance mechanisms. Nestlé also adopts this method by means of its Nestlé Supplier Code<sup>683</sup>. Subcontractors of the Egyptian Refinery Company are also “expected to be familiar with and support the company grievance mechanism and its processes” including participating in reporting of complaints and communicating with members of the local communities<sup>684</sup>.

### *iii. Community Relations Team*

The use of a community relations team may be a useful tool to disseminate information on the availability of operational-level grievance mechanisms beyond the paper-based methods. This is particularly important when the target audiences of the information are not the business enterprises’ employees or subcontractors, but are subcontracted agricultural workers who typically are locals in communities. A community relations team engages in discussions directly with locals about grievances they may encounter and advises on the availability of operational-level grievance mechanisms. For instance, a community relations team at Barrick Gold Corporation, a gold-mining company, engaged with locals in Peru and implemented the operational-level grievance mechanism on site<sup>685</sup>.

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<sup>682</sup> *Id.*

<sup>683</sup> Nestlé, *supra* note 669.

<sup>684</sup> Egyptian Refinery Company, *supra* note 671, at 5.

<sup>685</sup> Barrick Gold, *Barrick’s grievance mechanism officers share experiences, best practices, and challenges* (Oct. 13, 2017, 8:05 AM), <http://barrickbeyondborders.com/people/2016/01/barrick-grievance-mechanism-officers-share-experiences,-best-practices-and-challenges/>.

#### iv. *A Labor-rights Representation*

A labor-rights representation serves as an intermediary between the business enterprises and subcontracted workers with regard to disseminating the information on the availability of operational-level grievance mechanisms to subcontracted workers. For instance, Siemens requires its suppliers to have a form of labor-rights representation, such as a workers' council, at the suppliers' place of business<sup>686</sup>. Through their closer ties with subcontracted workers, members of the labor-rights representation are arguably in a better position to disseminate the information on the availability of operational-level grievance mechanisms or even encourage the use of such mechanism.

#### v. *Training*

Regular trainings of staff members and subcontractors are useful to ensure their awareness of the availability of operational-level grievance mechanisms. For instance, Chevron explicitly indicates in its Grievance Mechanism Procedure that “all Chevron Myanmar staff members and subcontractors that interact with external stakeholders should be made familiar with the grievance mechanism on an annual basis”<sup>687</sup>. Hence, staff members and subcontractors at Chevron Myanmar are expected to undergo annual reviews by the senior management on their awareness and understanding of Chevron Myanmar's grievance mechanism, as well as its expectations to disseminate the information on the availability of such mechanism to external stakeholders, including subcontracted workers.

The methods discussed above reveal that an important key to effectively disseminate the information on the availability of operational-level grievance mechanisms is the use of an intermediary, such as subcontractors/suppliers, community relations team and a labor-rights representation. Thus, it can be argued that the closer the intermediary is

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<sup>686</sup> Planitzer, *supra* note 648, at 94.

<sup>687</sup> Chevron Myanmar, *supra* note 672, at 1.



with subcontracted workers, the more effective the dissemination process could potentially be. Consequently, in the context of this research, sugar producers should design a system of intermediaries that would assist them in disseminating the information on the availability of operational-level grievance mechanisms to subcontracted agricultural workers.

### ***b. Ensuring the comprehension of intended users***

Another important aspect for the effective dissemination of the information on the availability of operational-level grievance mechanisms is to ensure the comprehension of their intended users. Studies have shown that one of the common challenges that prevent accessibility of communities to operational-level grievance mechanisms is language<sup>688</sup>. Literacy is also identified as a major barrier preventing effective access to operational-level grievance mechanisms<sup>689</sup>. Thus, language and literacy barriers should be addressed when designing methods of dissemination.

With regard to language, several operational-level grievance mechanisms address this matter explicitly. For instance, Siemens provides its “Tell Us” hotline in 13 languages<sup>690</sup>, whereas Coca Cola translates its Suppliers Guiding Principles into 12 languages<sup>691</sup>. Also, Inditex mandates its suppliers to display a copy of the Code of Conduct,

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<sup>688</sup> The Danish Institute of Human Rights, 7. *Challenges in the Current Practice of Operational-level Grievance Mechanisms* (Oct. 13, 2017, 10:10 AM), [http://www.menschenrechte-im-tourismus.net/fileadmin/user\\_upload/menschenrechte/Dokumente/9\\_TulikaBansal\\_Grievance\\_Mechanisms.pdf](http://www.menschenrechte-im-tourismus.net/fileadmin/user_upload/menschenrechte/Dokumente/9_TulikaBansal_Grievance_Mechanisms.pdf).

<sup>689</sup> Alice de Jonge, *Bringing the TNC under international law: institutional avenues*, in TRANSNATIONAL CORPORATION AND INTERNATIONAL LAW 169 (Edward Elgar Publishing Ltd., 2011), see also Manisuli Ssenyonjo, *Protect, Respect, and Remedy*, in INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 535, (Routledge, 2010).

<sup>690</sup> Planitzer, *supra* note 648, at 89.

<sup>691</sup> Coca Cola, Reference Documents (Oct. 13, 2017, 10:40 AM), <http://www.coca-colacompany.com/our-company/supplier-guiding-principles>.

which has been translated into the local language, in locations accessible to all workers<sup>692</sup>. In addition to translating into local languages, simplifying the disseminated message is also beneficial. As such, attention must be given to how the message is conveyed to its target audiences<sup>693</sup>. Also, the Scoping Paper reiterates the importance of this issue by stating that “information for workers on their rights and how to enforce them [must be] properly displayed and effectively communicate in an understandable format and in appropriate language”<sup>694</sup>.

The absence of the ability to read and write, i.e. the level of literacy, also poses a major barrier to accessing operational-level grievance mechanisms for many, including subcontracted agricultural workers. To alleviate the impact of this barrier, some business enterprises implement useful approaches. For instance, by recognizing the low level of literacy among its migrant workers, Samsung conducts pre-departure training prior to signing the employment contract in the sending country and post-arrival training before commencing employment in the receiving country. The purpose of these trainings is to ensure that the migrant workers understand Samsung’s Migrant Workers Guidelines, which affirm their legal rights and their eligibility to access the operational-level grievance mechanism, through the training conducted in their native languages<sup>695</sup>.

For subcontracted agricultural workers in Thailand’s sugar industry, both language and literacy pose major obstacles that hinder their

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<sup>692</sup> Inditex, *supra* note 670, at 6.

<sup>693</sup> International Finance Corporation, *Addressing Grievance from Project-affected Communities* (Oct. 13, 2017, 10:50 AM), <http://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>, at 4.

<sup>694</sup> U.N. OHCHR, *supra* note 608, at 36; see also Minawa Eibisui, Sean Cooney and Colin Fenwick (eds), *Resolving Individual Labor Disputes: A Comparative Overview* (Oct. 21, 2017, 3:15 PM), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_488469.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488469.pdf).

<sup>695</sup> Samsung, *supra* note 668, at 6.

comprehension of the availability of operational-level grievance mechanisms. The structured interviews revealed that most, if not all, subcontracted agricultural workers neither speak the Thai standard dialect, nor do they have sufficient ability to read<sup>696</sup>. Consequently, sugar producers should ensure that the information on the availability of operational-level grievance mechanisms is simplified for ease of understanding, as well as having trainings conducted in the local dialect.

## **2. Engaging intended users during the design stage**

Continuing from the previous subsection, the acknowledgment of the availability of operational-level grievance mechanisms should be earned from long, close association. Hence, sugar producers need to establish association with subcontracted agricultural workers. Establishing a long, close association requires an accumulation of trust over time. At the broad level, such long, close association can be achieved by means of organizing regular trainings and conducting inspections provided by the sugar producer. More specifically, a study shows that another approach to establish such long, close association with the aim of achieving acknowledgment of the availability of operational-level grievance mechanisms is by means of engaging the intended users – the subcontracted agricultural workers – during the design stage of the operational-level grievance mechanisms<sup>697</sup>.

According to the study by the Office of the Compliance Advisor/Ombudsman (CAO)<sup>698</sup>, it is indispensable to establish a design team that comprises and maintains a good balance of representations from all stakeholders, such as individuals of mixed levels and functions in the company. Importantly, representatives from the community and

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<sup>696</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>697</sup> The Office of the Compliance Advisor/Ombudsman for the International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), and Members of the World Bank Group, *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*, at 21.

<sup>698</sup> *Id.*, at 22.

actors in the supply-chain should be included <sup>699</sup> . Engaging representatives from the community and actors in the supply-chain during the design stage provides several advantages. First, the design team can gather valuable input and feedback from the representatives. With such input, the design team can develop an operational-level grievance mechanism that takes into account cultural and other considerations that may be sensitive to the community or actors in the supply-chain and prevent them from potentially disturbing the process. Second, the collaboration in the design team between members from the business enterprise and the community could generate a closer bond and convey the business enterprise's approachable and amicable intentions to the community. Third, the knowledge co-learned by all members of the design team during the design stage could be subsequently disseminated to the community or actors in the supply-chain more accurately and directly.

In Thailand's sugar industry, sugar producers should engage subcontracted agricultural workers during the design stage of their operational-level grievance mechanisms. This could be done by inviting representatives from subcontracted agricultural workers to provide input. If it is not possible for subcontracted agricultural workers to provide input during the design stage for any reasons, such as the lack of literacy or trust, sugar producers can still attempt to establish a long, close association with subcontracted agricultural workers through organizing regular trainings and conducting inspections.

#### **D. ADDRESSING POTENTIAL BARRIERS THAT PREVENT EFFECTIVE ACCESS**

Effective access to operational-level grievance mechanisms can be enhanced by eradicating potential barriers. As referred to in the UNGP Commentary, barriers to access may include "a lack of awareness of the mechanism, language, literacy, costs, physical location and fear of

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<sup>699</sup> *Id.*

reprisal”<sup>700</sup>. The first three potential barriers listed by the UNGP – namely, a lack of awareness, language, and literacy – have already been dealt with in the previous section. This section, therefore, addresses the remaining barriers – costs, physical location, and fear of reprisal. Additionally, barriers resulting from cultural considerations will also be examined.

## 1. Cost

The OHCHR has confirmed in its previous works that the cost of instigating claims is one of the greatest barriers to accessing grievance mechanisms, including operational-level grievance mechanisms<sup>701</sup>. The issue of cost is two-fold and should be examined from the perspective of both subcontracted agricultural workers and sugar producers. For subcontracted agricultural workers, in principle, seeking remedy through an operational-level grievance mechanism should be cost-free. In other words, the operational-level grievance mechanism should neither levy any fees onto the complainants, nor impose any stringent requirements that ultimately render the process costly. For instance, a process of preparing a formal complaint could require an investment of financial and human resources, especially if the complainant’s level of literacy is insufficient. Being cost-free, the operational-level grievance mechanism provides an advantage over judicial grievance mechanisms, as the latter’s process is typically lengthy, and its associated costs are beyond the capability of the less-privileged communities or workers to afford<sup>702</sup>. In addition, being cost-free could incentivize subcontracted agricultural workers to seek remedy at operational-level grievance mechanisms, thus resulting in the mechanisms’ greater accessibility. This character is resonated in the International Finance Corporation’s Five Principles for designing a good “project-based” grievance mechanism. As one of the

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<sup>700</sup> U.N.G.P., *supra* note 3, Principle 31, at 34.

<sup>701</sup> U.N. OHCHR, *supra* note 608, at 37.

<sup>702</sup> H.K.S., *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders*, in CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, (Cambridge, MA: John F Kennedy School of Government. Harvard University, 2008), at 11.

five principles, an operational-level grievance mechanism with effective accessibility is the one that is clear and understandable, and “is accessible to all segments of the affected communities at no cost”<sup>703</sup>. Likewise, the workshops organized by Fauna & Flora International (FFI) in response to designing an operational-level grievance mechanism at the Awacachi Corridor Project in Ecuador reveals that the locals should not incur any financial costs in lodging complaints<sup>704</sup>.

The interviewed subcontracted agricultural workers also expressed their concerns about cost. From the structured interview, some subcontracted agricultural workers were of the view that filing complaints at “anywhere” would cost them “ten to hundred thousand [THB]”<sup>705</sup>, and expressed their unwillingness to go through any types of grievance mechanisms. Their responses on cost seem to indicate their false perception on operational-level grievance mechanisms. While being costly may be accurate for judicial grievance mechanisms, the subcontracted agricultural workers seem not to be given sufficient information on the difference between judicial grievance mechanisms and operational-level grievance mechanisms. Hence, they may not be able to anticipate how low-cost or cost-free the operational-level grievance mechanism can potentially be when it is created.

For sugar producers, on the other hand, the key issue on cost is the maintenance of the companies’ financial feasibility while operating an operational-level grievance mechanism that does not levy any financial contribution from subcontracted agricultural workers. To manage the operating cost, the International Finance Corporation suggests that the budget should be estimated and allocated on a regular basis<sup>706</sup>. Hence, the source of funding should be “ring-fenced” regularly, such as annually, or at the stage of establishing the operational-level grievance mechanism<sup>707</sup>. In other words, the availability of funding should not be

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<sup>703</sup> I.F.C., *supra* note 693, at 3.

<sup>704</sup> Fauna&Flora International, *Grievance Mechanism: Lessons learned from REDD+ and other conservation strategies* (Apr. 2013), at 3.

<sup>705</sup> Interview with subcontracted agricultural workers

<sup>706</sup> I.F.C., *supra* note 693, at 3.

<sup>707</sup> H.K.S., *supra* note 702, at 19.

decided on a case-by-case basis<sup>708</sup>. From the interview, Mitr Phol Corp. acknowledged the issue of cost, and indicated that the company will work on managing the potential cost of operating an operational-level grievance mechanism that is accessible to subcontracted agricultural workers<sup>709</sup>.

## 2. Distant physical location

Subcontracted agricultural workers are normally in physical locations far away from the sugar producers' headquarters. The distance between the cluster of northeastern provinces and Bangkok is approximately 450 kilometers – a distance equivalent to a 6-hour drive, an 8-hour bus ride, or a 55-minute flight from Bangkok to some major airports in the area. From Zurich, such distance would equally amount to a trip to Frankfurt, Germany or to Lyon, France. Distant physical location undoubtedly imposes a major barrier to access. Traveling requires money and time, and subcontracted agricultural workers are usually not able to afford such luxury. One interviewed subcontracted agricultural worker indicated that if she had to travel to Bangkok to lodge complaints, it would be better for her and her family not to act or do anything<sup>710</sup>.

Conventionally, complaints must be submitted in person and without anonymity. Sandfire Resources NL, for instance, obliges employees to complete a Grievance Lodgment Form, which provides that the grievance is received “face to face or over the phone”<sup>711</sup>. However, with the constraints caused by the distant physical location, various operational-level grievance mechanisms adopt several measures aiming to eradicate this barrier. Many operators of operational-level grievance

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<sup>708</sup> *Id.*

<sup>709</sup> Interview with representatives from the Mitr Phol Group, in Bangkok.

<sup>710</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>711</sup> Sandfire Resources NL, *Grievance Mechanism Procedure* (Oct. 12, 2017, 7:30 AM), [http://www.sandfire.com.au/images/Grievance\\_Mechanism\\_Procedure.pdf](http://www.sandfire.com.au/images/Grievance_Mechanism_Procedure.pdf), at 4.

mechanisms allow complaints to be submitted by post, such as Siemens<sup>712</sup>, Chevron Myanmar<sup>713</sup>, Adidas<sup>714</sup>, and New Britain Palm Oil Ltd<sup>715</sup>. Other methods are also used. In the age of globalization, technology is what links people together. In theory, utilizing technology could eradicate the distant gap between subcontracted agricultural workers and sugar producers by not requiring subcontracted agricultural workers to travel to file complaints in person. This subsection explores several methods that are currently offered by existing operational-level grievance mechanisms.

**Hotline** – The telephone has been a telecommunication device since its invention in 1876, and today, approximately 4.77 billion people use mobile phones<sup>716</sup>. Most operators of operational-level grievance mechanisms enlist their telephone numbers for calls during office hours or offer 24-hour Hotline services to receive complaints. Examples of hotlines as a method of receiving and registering complaints are Siemens’ “Tell Us” Hotline<sup>717</sup> and Statoil’s Ethic Helpline<sup>718</sup>.

**E-mail** – The use of electronic mail, or e-mail, has been proven popular among people of today’s working generations. Radicati, a US-based technology market research firm, estimated that approximately 225.3 billion e-mails were sent and received each day in 2017, with a

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<sup>712</sup> Siemens, *supra* note 647.

<sup>713</sup> Chevron Myanmar, *supra* note 672.

<sup>714</sup> Adidas, *Third-Party Complaint Process* (Oct 14, 2017, 3:15 PM), [https://www.adidas-group.com/media/filer\\_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas\\_group\\_complaint\\_process\\_october\\_2014.pdf](https://www.adidas-group.com/media/filer_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas_group_complaint_process_october_2014.pdf).

<sup>715</sup> NBPOL, *Grievance Procedure for Stakeholder Issue* (Oct. 14, 2017, 1:15 PM), <http://www.nbpol.com.pg/wp-content/uploads/downloads/2011/02/Grievance-Procedure-for-Stakeholder-Issues-PNG.pdf>.

<sup>716</sup> Statista, *Number of mobile phone users from 2013 to 2019* (Oct. 14, 2017, 10:45 AM), <https://www.statista.com/statistics/274774/forecast-of-mobile-phone-users-worldwide/>.

<sup>717</sup> Siemens, *supra* note 647.

<sup>718</sup> Statoil, *Sustainability Report* (Oct. 23, 2017, 7:30 AM), <https://www.statoil.com/content/dam/statoil/documents/sustainability-reports/sustainability-report-2016-v2.pdf>, at 44.



worldwide number of e-mail accounts at 4,920 billion, and the number is continuing to grow<sup>719</sup>. Several operators of operational-level grievance mechanisms tap into this growing trend by offering a channel of receiving complaints by e-mail. Examples of operators allowing the submission of complaints by e-mail are Chevron Myanmar<sup>720</sup> and Adidas<sup>721</sup>.

**Online Submission** – Submitting complaints via the online platform is another possible option. As of June 2017, approximately 51.7% of the world population uses the Internet<sup>722</sup>. Typically, information and instructions regarding the online submission of complaints are made available on the operators’ websites. Examples of operators using this approach are the European Bank for Reconstruction and Development (EBRD)<sup>723</sup>, and Trans Adriatic Pipeline (TAP)<sup>724</sup>.

**Other methods** – Other methods to eradicate the barrier to access due to the distant physical location are mentioned in the Scoping Paper<sup>725</sup>. Despite originally addressing State-based non-judicial grievance mechanisms, examples of methods mentioned in the Scoping Paper could provide useful information. To eradicate the barrier to access due to the distant physical location, the Scoping Paper mentions the use of “traveling” tribunals or adjudicating panels commonly used in the field of environmental protection and the decentralization of panels into regional bodies commonly used in consumer protection cases<sup>726</sup>.

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<sup>719</sup> Radicati, *Email Statistics Report 2015-2019* (Oct. 14, 2017, 11 AM), <http://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf>.

<sup>720</sup> Chevron Myanmar, *supra* note 672, at 4.

<sup>721</sup> Adidas, *supra* note 714.

<sup>722</sup> Internet World Stats, *World Internet Usage and Population Statistics* (Oct. 14, 2017, 11:20 AM), <http://www.internetworldstats.com/stats.htm>.

<sup>723</sup> E.B.R.D., *How to Submit a Complaint* (Oct. 14, 2017, 11:25 AM), <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/submit-a-complaint.html>.

<sup>724</sup> TAP, *Online Grievance Upload* (Oct. 14, 2017, 11:10 AM), <https://www.tap-ag.com/grievance>.

<sup>725</sup> U.N. OHCHR, *supra* note 608.

<sup>726</sup> U.N. OHCHR, *supra* note 608, at 39.

Using telephone and the Internet is a fast, efficient tool for transmitting complaints to the operators of operational-level grievance mechanisms, and on the other end allows the operators to quickly respond to and manage the complaints. However, this can only be effective when the target users of operational-level grievance mechanism have the capability to use these channels. Fauna & Flora International identified that Internet or phone-based systems of reporting were not feasible because much of the local population did not have access to technology<sup>727</sup>. From the structured interviews with subcontracted agricultural workers, it was revealed that most, if not all, of them did not own either home or mobile phones<sup>728</sup>. The subcontracted agricultural workers cited their low income as the main reason for not owning any type of phone. Furthermore, they were unfamiliar with using the Internet, which is also too costly<sup>729</sup>. They neither own a computer, nor do they have any knowledge of using the Internet<sup>730</sup>. Consequently, using technology as a channel for filing complaints is highly likely to be impractical for subcontracted agricultural workers.

### 3. Fear of reprisal

Reprisal is an act of retaliation<sup>731</sup>, which is an action of harming someone because they have harmed oneself<sup>732</sup>. In the context of this research, reprisal refers to any action that a respondent takes – whether a subcontractor, a sugar producer, or other actors in the supply-chain – to harm a subcontracted agricultural worker, because they filed a complaint against them. Generally, reprisal can range from loss of job, demotion,

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<sup>727</sup> F.F.I., *supra* note 704, at 3.

<sup>728</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>729</sup> *Id.*

<sup>730</sup> *Id.*

<sup>731</sup> Oxford Dictionary, Reprisal (Oct. 14, 2017, 1:50 PM), <https://en.oxforddictionaries.com/definition/reprisal>.

<sup>732</sup> Oxford Dictionary, Retaliation (Oct 14, 2017, 1:55 PM), <https://en.oxforddictionaries.com/definition/retaliation>.

involuntary transfer, and harassment to intimidation<sup>733</sup>. For subcontracted agricultural workers, the interviewees speculated that reprisal might occur in the form of limited job opportunity in the future and possible threat or intimidation against their households<sup>734</sup>. Reprisal, therefore, becomes a major barrier that deters subcontracted agricultural workers from filing complaints.

The fear of reprisal barrier must be seriously addressed. The International Finance Corporation advocates that an operational-level grievance mechanism should have “a clear policy of non-retaliation measures”<sup>735</sup>. As such, operators of operational-level grievance mechanisms should “take steps to prevent retaliation against complainants”<sup>736</sup>. However, ensuring non-retaliation currently seems to be at a very premature stage. Normally, a clause mentioning the non-retaliation policy is the only indicator of a step being taken by operators of operational-level grievance mechanisms. For instance, Samsung stipulates that migrant workers “shall be able to raise grievance without fear of discrimination, intimidation, retaliation or any other penalty”<sup>737</sup>, but no further details are provided. Likewise, the grievance mechanism at Acacia Mining only briefly mentions that the mechanism must “help to overcome barriers people may face in accessing the mechanism” including “fear of retribution or reprisal”<sup>738</sup>.

Adidas, on the other hand, appears to have advanced in addressing the fear of reprisal barrier. In its Third-Party Complaint Process, Adidas states that it “recognizes the risk of retaliation facing workers making complaints about their employment conditions, or individuals raising

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<sup>733</sup> SkillBrief, *Forms of Retaliation* (Oct. 14, 2017, 2:10 PM), [https://ccpublibrary.skillport.com/ccpub/marriottcc/web/Content/cca/zmar\\_01\\_a04\\_lcc\\_enus/output/html/sb/sblch\\_01\\_a04\\_lc\\_enus144238.html](https://ccpublibrary.skillport.com/ccpub/marriottcc/web/Content/cca/zmar_01_a04_lcc_enus/output/html/sb/sblch_01_a04_lc_enus144238.html).

<sup>734</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>735</sup> I.F.C., *supra* note 693, at 15.

<sup>736</sup> I.H.R.B., *supra* note 654.

<sup>737</sup> Samsung, *supra* note 668, at 10.

<sup>738</sup> Acacia Mining, *Community Grievance Management and Resolution Procedure* (Oct. 14, 2017, 3:05 PM), <http://intranet.abg.local/polproc/SitePages/Policies.aspx>, at 8.

issues related to human rights violations”<sup>739</sup>. To prevent possible retaliation, Adidas does not disclose the identity of complainants when it believes that such disclosure would likely lead to intimidation or victimization<sup>740</sup>. Adidas released its Anti-Retaliation Policy to provide guidance to complainants who are at risk of being retaliated against. According to the Anti-Retaliation Policy, a complainant that believes he or she has been subject to retaliation after registering a complaint can contact and provide specific details to Adidas immediately. If the investigation reveals evidence of retaliation, appropriate actions will be taken against the retaliator, such as issuing a warning letter or bringing the case to the relevant judicial mechanism<sup>741</sup>.

Ensuring non-retaliation is essential for subcontracted agricultural workers. As they identified during the structured interviews, fear of reprisal plays a major role in discouraging them from potentially voicing their complaints to any entity, including an operational-level grievance mechanism provided by sugar producers<sup>742</sup>. Primarily, they express the fear of possibly losing future job opportunities at the sugar cane plantations, as those who lodge complaints are likely to be viewed as aggressive, arrogant, or disobedient<sup>743</sup>. In their view, subcontractors tend to prefer hiring agricultural workers who are obedient and quiet<sup>744</sup>. According to the interviewees, once subcontractors perceive certain agricultural workers as being troublesome, they may not hire those agricultural workers in the future or decide to arbitrarily dismiss them<sup>745</sup>. Additionally, they also fear for the safety of their family and households if they choose to make complaints<sup>746</sup>.

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<sup>739</sup> Adidas, *supra* note 714.

<sup>740</sup> Adidas, *supra* note 714, at 5.

<sup>741</sup> Adidas, *supra* note 714, at 11.

<sup>742</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>743</sup> *Id.*

<sup>744</sup> *Id.*

<sup>745</sup> *Id.*

<sup>746</sup> *Id.*

The above information suggests that sugar producers should provide assurance to subcontracted agricultural workers that they will not be subject to any form of retaliation when they submit complaints to operational-level grievance mechanisms. Issuing an Anti-Retaliation policy should be encouraged, as well as designing deterrence measures to take against subcontractors who are found to be retaliating against subcontracted agricultural workers. Such measures may range from issuing a warning letter to terminating current or future contracts.

#### **4. Cultural Considerations**

Culture, customs, and traditions in each geographical location are factors that should be carefully considered when designing an operational-level grievance mechanism. The UNGP Commentary does not specifically mention cultural considerations as one of the barriers to access, but the use of the word “may include” preceding the UNGP list<sup>747</sup> suggests that the UNGP is open for other possible barriers, including cultural considerations. Fundamentally, an operational-level grievance mechanism could become well accepted by the intended users if they perceived it as being “trustworthy and responsive to their customary ways”<sup>748</sup>. Cultural appropriateness is also listed as one of the five principles of a Good Grievance Mechanism<sup>749</sup>, suggesting that an operational-level grievance mechanism should be designed by “taking into account culturally appropriate ways of handling community concerns”<sup>750</sup>. To achieve cultural appropriateness, an operational-level grievance mechanism should seek input on culturally acceptable ways from different groups within the communities, understand cultural attributes, customs and traditions, and agree on the best ways to access grievance mechanisms “taking into consideration the way communities express and deal with grievances”<sup>751</sup>.

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<sup>747</sup> U.N.G.P., *supra* note 3, Principle 31, at 34.

<sup>748</sup> I.F.C., *supra* note 693, at 2.

<sup>749</sup> I.F.C., *supra* note 693, at 3.

<sup>750</sup> *Id.*

<sup>751</sup> I.F.C., *supra* note 693, at 9.

Generally, cultural considerations can be examined by studying the structure of the society where the intended users reside. For instance, if the society is hierarchical-based, it is recommended that the design team have discussions with and seek initial support from community leaders or key persons<sup>752</sup>. If institutionalized forms of segregation of roles and responsibilities based on specific factors, such as religious, political or social biases, are prevalent, the design team should ensure the participation of the respected persons during the development of the operational-level grievance mechanism<sup>753</sup>. If the intended users of the operational-level grievance mechanism are indigenous people, attention should be given to some of their sensitive issues, such as customary land rights and the impact on natural resources or cultural property<sup>754</sup>.

In Thai society, culture, customs, and traditions are ingrained and inseparable from the Thai way of living. It forms the cultural identity of Thai people, and it is unique and different from other societies. In fact, certain parts of Thai law incorporate culture and traditions into the legal text. For instance, in Family Law, a groom is required to provide marriage gifts (*sinsod*) and engagement gifts (*khongman*) to his bride and her parents, adopter, or guardian, as the case may be<sup>755</sup>. Typically not found in other jurisdictions, the Civil and Commercial Code steps into governing this local tradition of offering marriage and engagement gifts by regulating the ownership of the gifts and the grounds to return them to the groom<sup>756</sup>. For this research, it is essential to study the local culture of the subcontracted agricultural workers in the sugar cane supply-chain, in order to identify potential cultural considerations that may present barriers to access. The structured interviews revealed that there are certain considerations that warrant a closer analysis. First, when asked for the reasons behind their decisions to seek or not to seek remedy at the operational-level grievance mechanism provided by the sugar producer, most interviewees responded that they “did not want to get involved or

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<sup>752</sup> I.F.C., *supra* note 693, at 10.

<sup>753</sup> *Id.*

<sup>754</sup> *Id.*

<sup>755</sup> CIVIL AND COMMERCIAL CODE OF THAILAND, section 1437.

<sup>756</sup> *Id.*

create conflict with the subcontractors”<sup>757</sup>. In their view, they did not want to create any trouble for the subcontractors because after all “the subcontractors were the ones who gave them job opportunity” and that they “should be grateful for the opportunity they had been given”<sup>758</sup>. When asked the follow-up question on whether the seriousness of grievances would change their mind and they would decide to file claims, the interviewees said that they would rather forgive and let *karma* do its work, as they would still have to cohabit in the same geographical location with the subcontractor as a community<sup>759</sup>. However, if the interviewees would be given a full guarantee of non-retaliation from the subcontractors, most of them responded that they “might consider filing claims”<sup>760</sup>.

Information gathered from the structured interviews reveals several interesting observations. The most apparent Thai social custom is the tendency to avoid emotional extremes, especially on expressing anger. Arguably, this character stems from the Buddhist belief in reincarnation and the concept of *karma*<sup>761</sup>. According to Oxford Dictionary, *karma* refers to the sum of a person’s actions in this and previous states of existence, viewed as deciding their fate in future existence<sup>762</sup>. To avoid bad *karma*, it is advised not to express anger or engage in other bad behaviors towards others in order to prevent others from returning similar actions in the future. In this context, the concept of *karma* works in three-fold ways. First, it deters subcontracted agricultural workers from filing complaints, as they fear that they may face similar action against them in the future. Second, subcontracted agricultural workers tend to believe that subcontractors will face similar action in the future resulting from their “bad behaviors” or *karma* as a consequence of their

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<sup>757</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.

<sup>758</sup> *Id.*

<sup>759</sup> *Id.*

<sup>760</sup> *Id.*

<sup>761</sup> Arne Kislenko, *CULTURE AND CUSTOM OF THAILAND* 162 (Greenwood Publishing).

<sup>762</sup> Oxford Dictionary, *karma*, (Oct. 15, 2017, 9:15 AM), <https://en.oxforddictionaries.com/definition/karma>.

actions against them. Third, subcontracted agricultural workers may believe that the grievances they face are a consequence of their past actions.

Another dimension of the Thai culture that may explain the subcontracted agricultural workers' hesitation to file complaints is the concept of respect towards elders and those of higher status<sup>763</sup>. In brief, several political and social analyses emphasize the differences between the middle class (*chon chan klang*) and the lower class (*chon chan lang*)<sup>764</sup>. The middle class refers to “an affluent class consisting of homogenous urban-based elites”, while examples of the lower class are “farmers and other lower rungs of the society’s ladder”<sup>765</sup>. Differences in income also serve as a dividing line between the two categories, as the middle class earns significantly more than the lower class<sup>766</sup>. Hence, in this context, subcontracted agricultural workers who generally earn less income are regarded as members of the lower class, whereas subcontractors who generally generate higher income are considered to be in the middle class. As a result, subcontracted agricultural workers are likely to feel inferior to subcontractors, to the point that they should respect the subcontractors owing to the latter’s arguably higher societal status, and, therefore, should not “disturb” or “cause the person of higher status to lose his or her dignity”<sup>767</sup>.

Deeply ingrained in the Thai culture, the notion of “avoiding confrontation” is widely practiced in the Thai society. Commonly, Thai

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<sup>763</sup> Kislengo, *supra* note 761, at 162.

<sup>764</sup> Tsuruyo Funatsu, *Theories of the Middle Class in Thailand*, Institute of Developing Economies (Chiba, 2000).

<sup>765</sup> *Id.*

<sup>766</sup> Tsuruyo Funatsu and Kazuhiro Kagoya, *The Middle Classes in Thailand: The Rise of the Urban Intellectual Elite and Their Social Consciousness* (Oct. 15, 2017, 9:50 AM), <http://onlinelibrary.wiley.com/store/10.1111/j.1746-1049.2003.tb00940.x/asset/j.1746-1049.2003.tb00940.x.pdf;jsessionid=00744239E6F6E387F697EC1AE10BDE45.f01t04?v=1&t=j8sfy6sn&s=a8ca85c3412445300ea0be46ccca890ed59384fb>.

<sup>767</sup> Interview with subcontractors and subcontracted agricultural workers, in Khon Kaen and Buriram.; see also Kislengo, *supra* note 761, at 162.



people tend to avoid confrontation by telling the angered person to have “a cool heart” or *jai yen yen*, or to dismiss the grievance as “it is just nothing, or it is just doesn’t matter” or *mai pen rai*<sup>768</sup>. Some academics justify these relaxed attitude as deriving from the “Buddhist perceptions of impermanence and transitory nature of life”<sup>769</sup>, as they advocate that the feeling of anger is impermanent, and one should reincarnate to the next life free of any anger or worry. Consequently, subcontracted agricultural workers tend to have a high threshold with regard to deciding factors on whether to dismiss a grievance as *mai pen rai*, or to file complaints to any grievance mechanism, including an operational-level grievance mechanism.

Based on these observations, sugar producers should incorporate the cultural considerations that are unique to subcontracted agricultural workers when designing an operational-level grievance mechanism. In general, the barriers to access resulting from identified cultural considerations revolve around the hesitation to file complaints. Thus, it is essential for the design team to address such barrier accordingly. First, to accommodate the notion of avoiding confrontation, the operational-level grievance mechanism should ensure the anonymity of complainants. This suggestion has been implemented by several operators of operational-level grievance mechanisms, such as Adidas<sup>770</sup>, Chevron Myanmar<sup>771</sup>, and the EBRD<sup>772</sup>, and is affirmed by the International Finance Corporation as a recommended approach<sup>773</sup>. Second, it may be useful for sugar producers to directly communicate, preferably in the local dialect, with subcontracted agricultural workers with the aim to recast their thinking – for example by explaining that claiming justice or their rights should not be fused with the fear of *karma*, the feeling of inferiority, or the societal expectation to avoid confrontation. Third, sugar producers may provide certain assurance of

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<sup>768</sup> Kislengo, *supra* note 761, at 162.

<sup>769</sup> WILLIAM J. KLAUSNER, REFLECTIONS ON THAI CULTURE 78-85, 245-249 (1993).

<sup>770</sup> Adidas, *supra* note 739.

<sup>771</sup> Chevron Myanmar, *supra* note 672.

<sup>772</sup> E.B.R.D., *supra* note 723.

<sup>773</sup> I.F.C., *supra* note 693, at 11.

non-retaliation to subcontracted agricultural workers. For instance, sugar producers could enforce their anti-retaliation policy on their subcontractors. Alternatively, when damage may have occurred resulting from any form of retaliation, the sugar producers may mitigate the impact by assisting the affected subcontracted agricultural workers to find new employers. Whichever method the sugar producers may employ, cultural considerations remain one of the major barriers to access that they cannot afford to neglect when designing an operational-level grievance mechanism that ensures effective access.

## CONCLUSION

Chapter VI was dedicated to exploring issues concerning the enhancement of effective access of subcontracted agricultural workers to operational-level grievance mechanisms administered or operated by sugar producers. *Section VI.A* first revisited the UNGP's accessibility criteria and scrutinized its elements – identifying intended users, being known, identifying potential barriers, and providing adequate assistance. Using information from Chapter IV, *Section VI.B* discussed the identification of eligible intended users and argued that subcontracted agricultural workers should be considered as eligible intended users and admissible grievances clearly defined. Then, *Section VI.C* explored methods of building awareness among subcontracted agricultural workers, such as methods of disseminating information on the availability of an operational-level grievance mechanism provided by the sugar producers. Finally, *Section VI.D* identified potential barriers to access, based on the UNGP Commentary and structured interviews. Examined barriers were cost, physical location, fear of reprisal, and cultural considerations. Chapter VI concluded that all explored issues should be examined at an early stage, particularly prior to designing an operational-level grievance mechanism, in order to ensure that most, if not all, barriers were already addressed and eradicated. By doing so, this research argued that this could enhance the accessibility of the intended users – subcontracted agricultural workers – to the operational-level grievance mechanisms administered or operated by sugar producers.



# Conclusion and Recommendations

Throughout this research, focus was targeted on addressing the problem of subcontracted agricultural workers not being able to access operational-level grievance mechanisms that are administered or operated by sugar producers. This research found that subcontracted agricultural workers often encountered situations which could be considered as grievances, such as receiving payments below the legal daily minimum-wage and working beyond the maximum permitted daily work-hours. This research reported that certain types of grievance mechanisms were available to subcontracted agricultural workers, but each of them had its unique limitations. For instance, operational-level grievance mechanisms administered or operated by sugar producers are limited to internal use. In other words, only employees of the sugar producers can access these operational-level grievance mechanisms. This is due to the structure of the supply-chain, where sugar producers subcontract the harvest work to subcontractors, who then employ subcontracted agricultural workers to perform such work. Hence, the subcontracted agricultural workers do not have any formal employment relationship with the sugar producers. The crux of this issue is whether the sugar producers should extend the applicability of their operational-level grievance mechanisms to non-employees in their supply-chain, particularly the subcontracted agricultural workers, and on what grounds? Building from this preliminary question, this research asked several further questions with the ultimate objective of ensuring accessibility for subcontracted agricultural workers to operational-level grievance mechanisms.

## A. ANSWERING RESEARCH QUESTIONS

The general theme of this research has been on area of business and human rights. Business and human rights have received global attention following the recognition that business enterprises can also cause or contribute to adverse human rights impact resulting from their business operations. With the limitation of the current international human rights law regime where none of the codified international human rights standards are formally applicable to non-State actors such as business enterprises, alternative channels to anchor corporate responsibility to respect human rights were explored. The iconic product of this initial exploration was the introduction of the UN Guiding Principles on Business and Human Rights (the UNGP). Since their introduction in 2008, the UNGP have received widespread attention from both States and business enterprises. Academic papers have been written and many other initiatives have been carried out to study the implementation of these principles. While not creating new international law obligations or undermining any States' existing legal obligations, most, if not all, academic literature and initiatives in the field of business and human rights have grounded their research on the principles advocated by the UNGP – the *de facto* most authoritative document in this field. This research also used the UNGP as its basis for study. Chapter II revisited the global standard for access to remedy and outlined the structure of the UNGP.

While all three Pillars of the UNGP – the State duty to protect human rights, the corporate respect of human rights, and access to remedy – are arguably of equal importance and interlinked, academic efforts and initiatives have focused on the first two Pillars. “Access to remedy” has largely been overlooked, and has only recently started to receive more attention. To date, the most recent comprehensive work on Access to Remedy is the work of the Office of the UN High Commissioner for Human Rights's Accountability and Remedy Project II, which discussed current issues, practices and challenges on access to remedy at State-based non-judicial grievance mechanisms. Yet, academic literature, which specifically addressed operational-level grievance mechanisms, remains limited in number. Thus, this research grasped the void in the

academic works and studied the implementation aspect of the UNGP Pillar III Access to Remedy, specifically on operational-level grievance mechanisms.

This research conducted a qualitative and documentary study in the context of Thailand's sugar industry. All background information on Thailand's reaction to the UNGP and Thailand's sugar industry, such as identifying actors and mapping the supply-chain, were provided in Chapter III. With the background information stated, this research provided answers to the research *Question 1*, which asked:

**Are there any operational-level grievance mechanisms that are currently available for and accessible by subcontracted agricultural workers in Thailand's sugar industry, and, if yes, what are they?**

In Chapter III, it was illustrated that there are several grievance mechanisms available for subcontracted agricultural workers, excluding operational-level grievance mechanisms. This is because, currently, the only operational-level grievance mechanism in Thailand's sugar industry based on the available information at the time of writing is the one administered and operated by the Mitr Phol Sugar Corp. (the Mitr Phol mechanism). Regrettably, the Mitr Phol mechanism is only available for Mitr Phol's employees.

As for the other types of grievance mechanisms, this research has mapped them in Chapter III Section III.D "Existing Grievance Mechanisms in Thailand". For State-based judicial grievance mechanisms, subcontracted agricultural workers can instigate their claims at the Courts of Justice. More explicitly, the Labor Court has specific jurisdiction over labor rights-related claims. While there are specific features that eradicate certain barriers such as cost and physical location at the Labor Court proceedings, subcontracted agricultural workers may only instigate their claims against their employers (subcontractors) and not against sugar producers. The Alternative Dispute Resolutions (ADR), such as arbitration (both court-annexed and *ad hoc*) and mediation, are perceived to be the "friendlier" options, but the lack of knowledge and financial ability often bar subcontracted

agricultural workers from gaining access to the ADRs. With regard to State-based non-judicial grievance mechanism, subcontracted agricultural workers can instigate their claims at the Sugar Cane Workers Institutes at the Office of the Cane and Sugar Board (OCSB), the Right and Liberties Protection Department (RLPD), and the National Human Rights Commissions of Thailand (NHRC). Nevertheless, barriers to access these State-based non-judicial grievance mechanism remain major obstacles. For instance, the OCSB Mechanism is perceived as untrustworthy and not transparent, whereas the RLPD and the NHRC lack adjudicative power and must rely on the cooperation with other relevant authorities.

From the finding, this research argued that the limitations and barriers associated with State-based, both judicial and non-judicial, grievance mechanisms are difficult to overcome or circumvent. Therefore, it was suggested that the use of operational-level grievance mechanisms, particularly the ones administered or operated by sugar producers, could be a more effective method of providing remedy to subcontracted agricultural workers. With the limitations and barriers to access operational-level grievance mechanisms identified, this research has provided answers to the research *Question 2*, which asked:

**What are legal and practical barriers that could potentially prevent subcontracted agricultural workers in Thailand's sugar industry from gaining access to operational-level grievance mechanisms, and how can the barriers be reduced or eliminated?**

Providing answers to this question required a series of analyses on different aspects of the issue. This research argued that there are several barriers that currently prevent subcontracted agricultural workers in Thailand's sugar industry from gaining access to operational-level grievance mechanisms administered or operated by sugar producers. These barriers have been addressed as follows:



### *Uncertainty of admissible grievances*

Chapter IV was dedicated to addressing this barrier. It was founded on the presumption that the uncertainty of admissible grievances posed a barrier to access, as subcontracted agricultural workers were unsure whether their grievances would be admissible to operational-level grievance mechanisms administered or operated by sugar producers. As a result of this ambiguity, subcontracted agricultural workers might choose not to sacrifice their limited resources, such as time and money, to seek access to remedy from such operational-level grievance mechanisms. To eradicate this barrier, a documentary study was conducted to map potential grievances that should be considered admissible to the operational-level grievance mechanisms.

Before commencing the study, it was noted that grievances could occur in a variety of forms. Their magnitude could range from a minor discomfort arising from undesirable working conditions to a human rights violation based on internationally recognized human rights instruments. In other words, human rights violations are grievances, but not every grievance is based on a human rights violation. This research, therefore, chose to limit the scope of study to the context of the UNGP. The UNGP creates the responsibility of business enterprises to respect human rights e based on internationally recognized human rights – “understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work”. Other sources of possible grievances are based on relevant human rights protection promulgated in Thailand’s national legislations, those identified by subcontracted agricultural workers through a series of structured interviews, and those reported by the NHRC.

This research argued that sugar producers should create a non-exhaustive list of admissible grievances to their operational-level grievance mechanisms based on the sources identified. Therefore, this non-exhaustive list should contain, and not be limited to, grievances that affect the following:

Sources	Admissible grievances
International Bill of Human Rights	<p>Grievances that affect:</p> <ul style="list-style-type: none"> <li>• The right to equality and non-discrimination, especially on work-related discrimination</li> <li>• The right to life</li> <li>• The right to be free from torture and inhuman treatment</li> <li>• The right not to be subject to all forms of forced or compulsory</li> <li>• The right not to be subject to child labor</li> </ul>
Human Rights Protection in Thailand National Legislations	<p>Grievances relating to:</p> <ul style="list-style-type: none"> <li>• Unequal treatment and gender discrimination</li> <li>• Sexual abuse</li> <li>• Illegal working conditions</li> <li>• Non-provision of occupational safety, health, and environment</li> <li>• Payment below minimum daily wage</li> <li>• Non-provision of welfare</li> <li>• Unfair dismissal</li> <li>• Non-performance of duty of employers (subcontractors)</li> <li>• Non-provision of special protection (for female employees)</li> </ul>
Interviewees	<p>Grievances concerning:</p> <ul style="list-style-type: none"> <li>• Wage payment below daily minimum wage</li> <li>• Extended working hours beyond maximum daily working hours</li> <li>• The use of child labor</li> </ul>
The NHRC Report	<p>Grievances concerning:</p> <ul style="list-style-type: none"> <li>• Trespass of national forest and land grabbing</li> <li>• Forced eviction from land</li> </ul>

Consequently, it was argued that identified admissible grievances could provide transparency and consistency, as well as assisting the administrator and/or the operator of operational-level grievance mechanisms during the preliminary review on the admissibility of the filed grievances. At the same time, this consistency could provide reassurance to subcontracted agricultural workers who may no longer question the admissibility of their grievances, thereby increasing their confidence for filing claims.

### ***Missing link between sugar producers and grievances***

Chapter V Section A was dedicated to addressing this barrier. Pursuant to the UNGP's suggestion on corporate responsibility (that business enterprises should have proactive responsibility "to avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved"), this chapter departed from the presumption that business enterprises should only bear such responsibility if they were actually involved in the adverse human rights impact that resulted in the claimed grievances. In the context of this research, there should therefore be a linkage to determine the involvement of sugar producers with grievances claimed by subcontracted agricultural workers. To establish this linkage, the research explored the triggering conditions advocated by the UNGP – cause, contribute, and directly linked. For cause, this research argued that for a sugar producer to be considered as "having caused" an adverse human rights impact on subcontracted agricultural workers in their supply-chain, it should be established that 1) the sugar producers had a certain degree of ability to manage the chance of the impact from occurring or recurring and 2) that the sugar producer did not execute such ability, whether through its action or omission, to avoid or address the impact. For contribute, it was argued that for a sugar producer to be considered as "having contributed" to an adverse human rights impact on subcontracted agricultural workers in its supply-chain, it should be established that 1) the sugar producer had a business relationship with the entity that caused such adverse human rights impact and 2) the sugar producer had a certain material or substantial degree of influence in making such adverse human rights impact happen, such as facilitating or incentivizing the said entity to cause such impact. For directly linked,

this research argued that a sugar producer could be “directly linked” to an adverse human rights impact on subcontracted agricultural workers in its supply-chain if it could be established that 1) the sugar producer had a business relationship with the entity that caused such adverse human rights impact and 2) the sugar producer benefitted from the operations, products or services of such entity.

Consequently, it was argued that, in the context of this research, sugar producers could be both directly and indirectly involved with adverse human rights impact on subcontracted agricultural workers depending on the nature and/or the causer of the reported grievances. In the most likely scenario when subcontractors caused adverse human rights impact (admissible grievances) to subcontracted agricultural workers, sugar producers could be considered as having contributed to such impact because 1) the sugar producers had a business relationship with the subcontractors and 2) the sugar producers typically had a substantial degree of influence over subcontractors to cause the alleged impact, as the interviewees reported during the structured interviews that sugar producers at times apparently applied inconsistent acceptance criteria for sugar cane and charged high transportation fees. With the increased financial burden, the subcontractors then typically passed on the costs to be absorbed by the subcontracted agricultural workers through a reduction of the daily wage in order to maintain profitability or prevent further losses. Alternatively, sugar producers that did not have a substantial degree of influence over the subcontractors could become involved by being directly linked to the adverse human rights impact through benefitting from the operations of the subcontractors that caused such impact.

### ***Missing link between sugar producers and subcontracted agricultural workers***

Chapter V Section B was dedicated to addressing this barrier. Based on their position in the supply-chain and the fact that legally sugar producers do not have an employment relationship with subcontracted agricultural workers, this chapter departed from the presumption that sugar producers should extend the applicability of their operational-level grievance mechanisms to non-employees in their supply-chain – subcontracted

agricultural workers. To establish this linkage, the research explored the potential legal basis that could provide a connection between business enterprises and non-employee complainants. Due to the commonality with Thailand in terms of economy, labor economics and geographical location, the countries selected for comparison were members of the ASEAN – the Association of Southeast Asian Nations, which Thailand is a member of.

The first basis for establishing linkage between business enterprises and non-employee complainants is the extension of the scope of employer's obligations to non-employees. This extension was found in the labor laws of several ASEAN jurisdictions, which also reflected the recognition of the practice of subcontracting work. This extension obliges a business enterprise (who is a client of a subcontractor) to fulfill obligations directly to subcontracted workers based on certain conditions, such as the requirement that the work that subcontracted workers perform must be part of the manufacturing process of the business enterprise. The second basis for establishing linkage between business enterprises and non-employee complainants is the extension of the scope of employer's liabilities to non-employees. Also found in the labor laws of several ASEAN jurisdictions, this extension circumvents the conventional restriction of requiring a formal employment relationship by resorting to the civil law principle of solidary liability and the common law principle of joint and several liabilities, depending on the jurisdiction. In the context of this research, a subcontracted agricultural worker would be considered a creditor on the one end, and a sugar producer and a subcontractor would be considered joint debtors on the other end. Hence, the subcontracted agricultural worker could bypass the subcontractor and claim damage directly from the sugar producer. Once the sugar producer provided remedy to the subcontracted agricultural worker, the sugar producer could then pursue the subcontractor for the latter's share of liability.

This research found that despite the existence of some linkages, their application remains limited in subject matter. While human rights violations (identified as grievances in this research) can occur in many ways, the study showed that the common ground, in which relevant laws allow for the application of such linkages, is the issue of remuneration,

particularly on wages. Other grounds, such as payment of compensation, the provision of welfare benefits and the protection of occupational safety and health, can only be found in some jurisdictions. The spectrum of protection varies from the ultimate protection virtually on all possible grounds “as if the subcontracted worker is employed by the client” as evident in the laws of the Philippines and Indonesia to the limited protection only on the non-payment of wages ground as evident in the laws of Malaysia, Singapore and Thailand. For Thailand, there are a few obstacles, both legal and practical, that could potentially hinder the access to remedy for subcontracted agricultural workers. First, as mentioned, the scope of issue that can trigger solidary liability is only limited to non-payment of wages, whereas other potential adverse human rights violations could, in fact, involve other issues such as working conditions and child labor. Second, while the Labor Protection Act imposes the solidary liability on several levels of subcontractors, it leaves out the client from the liability scheme. In the context of this research, subcontracted agricultural workers can only seek redress from a pool of subcontractors, if not initially satisfied from the subcontractor who is their direct employer. Third, although the Labor Protection Act requires the sugar producers to provide benefits and welfare to subcontracted agricultural workers whose work is part of their manufacturing process or under their responsibility. However, the condition for the sugar producers’ having to provide such benefits and welfare to subcontracted agricultural workers is the existence of the same job description as the one for its own employees. Since sugar producers do not typically employ agricultural workers, references to employees having the same job description are difficult to establish.

Consequently, this research argued that the extension of the scope of employer’s obligations and liabilities found in the labor laws of some ASEAN countries provided a legal basis for establishing the linkage between business enterprises and their non-employees. Such linkages provide an argument for non-employees, including subcontracted agricultural workers, to engage business enterprises into their claims. Additionally, not only could such linkages remind business enterprises that they are, in fact, obliged by law to address the grievances, they could also send a message to business enterprises that it may be more advisable for them to resolve disputes and provide remedy for non-employees in

their supply-chain through their own operational-level grievance mechanisms to avoid encountering potential negative publicity. In the context of this research, sugar producers should thus address the grievances and be encouraged to provide operational-level grievance mechanisms to subcontracted agricultural workers, as well as ensure that subcontracted agricultural workers can effectively access them.

### ***Practical barriers identified by the UNGP***

Chapter VI Section D was dedicated to addressing the practical barriers identified by the UNGP. It departed from the presumption that the eradication of such practical barriers could ensure that affected subcontracted agricultural workers would be provided with just remediation and have effective access to operational-level grievance mechanisms administered or operated by sugar producers. To eradicate such barriers, this research conducted the documentary study on the UNGP Principle 31 to scrutinize the identified barriers – cost, distant physical location, and fear of reprisal – as well as exploring some operational-level grievance mechanisms provided by business enterprises in other industries, depending on the availability and accessibility of the information. On cost, the research argued that business enterprises should ensure that the use of their operational-level grievance mechanisms should be cost-free. While this research also recognized that the operation of operational-level grievance mechanisms can place a financial burden on business enterprises, it was suggested that the solution to maintaining financial stability could be that the source of funding should be “ring-fenced” regularly, such as on an annual basis, instead of being decided on a case-by-case basis. On distant physical location, this research provided examples of practices from other operational-level grievance mechanisms in different industries, such as the use of a hotline and the Internet, that aim to eradicate the distance barrier. However, it was noted that while the use of the Internet has become the typical solution, it might not be feasible in the context of this research, as most, if not all, subcontracted agricultural workers neither owned phones nor could they afford to use the Internet. It was thus suggested that to eradicate the distance barrier in the context of this research, the sugar producers should resort to more conventional methods, such as appointing a local representative who is well-received

by subcontracted agricultural workers to serve as an intermediary between sugar producers and subcontracted agricultural workers, or using the so-called “traveling tribunal”. On fear of reprisal, it was argued that sugar producers should provide assurance to subcontracted agricultural workers that they would not be subject to any forms of retaliation when they submitted complaints to operational-level grievance mechanisms. Issuing an Anti-Retaliation policy should be encouraged, as well as designing deterrence measures to impose against subcontractors who are found to be retaliating against subcontracted agricultural workers. Such measures may range from issuing a warning letter to terminating current or future contracts.

From the findings, it was established that legal and practical barriers that prevent subcontracted agricultural workers in Thailand’s sugar industry from gaining access to operational-level grievance mechanisms administered or operated by sugar producers should be addressed. Among all potential barriers, this research argued that barriers concerning uncertainty of admissible grievances, missing linkage between sugar producers and admissible grievances, missing linkage between sugar producers and subcontracted agricultural workers, as well as barriers addressed by the UNGP are important and should be tackled first. Moreover, this research acknowledged that there could not be a “one-size-fits-all” approach to resolving the issues on barriers to access entirely. With such acknowledgement and the issue contextualized, this research provided answers to the research *Question 3*, which asked:

**Can an operational-level grievance mechanism based on the UNGP accessibility criteria and/or guidelines be developed in a manner that are contextually appropriate and tailored to Thailand’s sugar industry, and, if yes, how?**

Building on the previous chapters, which addressed the issues on barriers to access, Chapter VI was dedicated to examining and discerning the elements of the UNGP accessibility criteria. A categorization of the text “being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access”, resulted in the four-step test: (1) identifying intended users, (2) being known, (3) identifying potential barriers to access, and



(4) providing adequate assistance. Based on these elements, it was argued that to ensure effective access to an operational-level grievance mechanism, the administrator and/or the operator must clearly identify the intended user (and this should extend to non-employees, such as subcontracted agricultural workers), disseminate information and ensure the comprehension of the intended users regarding the existence of the operational-level grievance mechanism so that it is known to the intended users (discussed in details in Chapter VI Section C), identify and address potential barriers to access, and provide adequate assistance to the intended users. This research also examined the current practices and challenges regarding the use of operational-level grievance mechanisms with the help of publicly available information from various business enterprises, as well as studying two prominent mechanisms at the OECD and the World Bank (the WBIP).

Chapter VI Section D.4 revealed several barriers that were contextually applicable to Thailand's sugar industry, as well as Thailand in general. Entitled "cultural considerations", this section provided a narration on the uniqueness of Thai people's perception with regard to dispute resolution as well as ways to address these cultural considerations. Based on these observations, the research argued that sugar producers should incorporate the cultural considerations that are unique to subcontracted agricultural workers when designing an operational-level grievance mechanism, for example by ensuring anonymity of complainants in order to avoid confrontation, providing direct communication channels, preferably in the local dialect, with the aim to recast their thinking – that claiming for justice should not be fused with the fear of *karma*, the feeling of inferiority, or the societal expectation to avoid confrontation. Moreover, sugar producers should provide certain assurance of non-retaliation to subcontracted agricultural workers, such as enforcing their anti-retaliation policy on their subcontractors or assisting affected subcontracted agricultural workers to find new employers.

## **B. LIMITATIONS AND CONTRIBUTIONS**

This study acknowledged several limitations, which could be further addressed and strengthened in future research. First, the information on operational-level grievance mechanisms specifically used in the agricultural industry, if there were any, was not publicly accessible at the time of writing. Hence, this research referred to operational-level grievance mechanisms used in other industries in order to explore current practices and identify barriers. Second, this research was contextualized to Thailand's sugar industry. While the results and recommendations may not be entirely applicable to other industries or geographical locations, it was argued that most of the fundamental principles should be universally applicable and usable. On contributions, this research was conducted just at the time when the OHCHR released its Accountability and Remedy Project II on State-based non-judicial grievance mechanisms. As the OHCHR Project has yet to address the issue of operational-level grievance mechanisms, this research hopes that the results and recommendations herein are beneficial and can contribute to the completion of the OHCHR's future Project, potentially on operational-level grievance mechanisms. At the same time, the results and recommendations of this research could be helpful for business enterprises looking to establish and particularly enhance the accessibility to their operational-level grievance mechanisms for actors in their supply-chain, including subcontracted workers.

## **C. RECOMMENDATIONS**

The recommendations provided herein should be useful for business enterprises that are currently developing their operational-level grievance mechanisms to address adverse human rights impacts occurring in their supply-chain. Specifically, the recommendations address the issue of accessibility to such mechanisms for non-employees, such as subcontracted workers. This research, therefore, recommends that in developing operational-level grievance mechanisms that ensure

accessibility for all actors in the supply-chain, business enterprises should:

1. Map all actors in their supply-chain. This is to ensure that no actors are excluded or neglected from being eligible to access the operational-level grievance mechanism.
2. Identify and list all admissible grievances. For the identification of admissible grievances references should be made to the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, relevant human rights protection promulgated in the respective countries, those identified by the actors in the supply-chain, as well as reports from relevant authorities such as the National Human Rights Commission. Such list should be non-exhaustive, as it should remain open for more interpretation and future inclusion.
3. Identify and acknowledge their linkage with their business partners. This follows the categorization of involvement by the UNGP – cause, contribute, and directly linked. This acknowledgement serves as a basis for business enterprises to engage in addressing adverse human rights impacts by providing remedy through their operational-level grievance mechanisms.
4. Adhere to the legal linkage based on the applicable laws in their respective jurisdiction. While it is beyond the competence and reach of this research to recommend States to adjust and/or strengthen their labor laws to accommodate the extension of the scope of employer's obligations and liabilities, this research recommends that business enterprises should adhere to the applicable laws in their respective jurisdiction and provide remedy to non-employees in their supply chain based on, or even beyond, the legal requirements.
5. Address and eradicate all potential barriers to access. All potential barriers to access, especially those listed in the UNGP Principle 31, should be seriously addressed and eradicated. Methods to eradicate should consider the practicality and feasibility of implementation. For instance, the dissemination of knowledge on the existence of operational-level grievance mechanisms should not entirely be based on the Internet or other technical means, as the intended users could not effectively benefit from these methods as they do not have the means or sufficient ability to use them.

6. Cultural considerations should be addressed for appropriateness. Each location has its own cultural characteristics, such as the societal structure and the peoples' beliefs. Therefore, they should be appropriately taken into consideration and overcome.

In conclusion, this research hopes to contribute to the current pool of academic literature on business and human rights by addressing the problem of inaccessibility to business enterprises' operational-level grievance mechanisms for non-employees. Working in context, this research addressed the specific problem of inaccessibility for subcontracted agricultural workers to operational-level grievance mechanisms that are administered or operated by sugar producers. As grievances are most easily addressed and remediated with effective access to operational-level grievance mechanisms, it was argued that the rights to effective remedy of subcontracted agricultural workers would be guaranteed, and their livelihood and well-being improved, despite the fact that they continue to harvest sugar cane in Thailand's plantations against the scorching heat of the mid-day sun.

## APPENDIX A.

### STRUCTURED INTERVIEW METHODOLOGY

#### A1 CONTEXT

Issues	Subcontracted agricultural workers		Subcontractor		Sugar producer	
Type of location	Sugar cane plantations		Sugar mills		Headquarter	
Number of interviewees	See Appendix D. for further details.					
Location/Date	Buriram 1	22.08.16	Buriram	22.08.16	1st interview	30.08.16
	Buriram 2	23.08.16				
	Khon Kaen 1	25.08.16	Khon Kaen	26.08.16	2nd interview	28.06.17
Khon Kaen 1	26.08.16					
Access to interview locations	Road transport to the sites, led by suppliers				Boardroom meeting at Mitr Phol headquarter, with prior permission approved	
Anonymity of responses	Employers (suppliers) agreed to remain outside of the interview area.		n/a		n/a	
Translation	Mr. Pormest Wongsatitporn (LL.M., Chulalongkorn) served as a translator from Northeastern (Esarn) local dialect into standard (central) Thai throughout all interviews, as most of the interviewees were unable to speak the standard dialect.				n/a	
Consent	The consent form was distributed in English together with the Thai translation. The interviewees were asked to sign in the English form. The detail of the consent form is provided in the Appendix C.					
Confidentiality	The interviewees indicated that their responses and their contribution to this research shall remain anonymous.				n/a	

## A2 STRUCTURE OF INTERVIEWS

<b><u>Stages</u></b>	<i>Subcontracted agricultural workers</i>	<i>Subcontractor</i>	<i>Sugar producer</i>
<b>Stage 1 Preliminary</b>	Before conducting each interview, the researcher informed and provided the interviewees with the following details: 1) Full title of the project 2) Name and position of the researcher 3) Consent form (see Appendix C.) 4) Information sheet containing a brief object and purpose of the research and background information (see Appendix E.)		
<i>*Information sheet</i>	Mr. Wongsatitporn read out the information sheet in the local dialect to the interviewees and confirmed their understanding.		The information sheet was sent to the interviewees via email prior to the interview.
<b>Stage 2 Group</b>	The interviewees were collectively asked the preliminary questions.	Due to the small number of the interviewees and limited time, the researcher combined Stage 2 and 3 and used the prepared questions as guidelines. Follow-up questions were asked.	
<b>Stage 3 Individual</b>	After Stage 2, the researcher separated the interviewees, and conducted interview individually. Each interviewee was asked the same series of questions, which were prepared prior to the interview.		
<i>*Structured interview questions are provided in Appendix B.</i> <i>**During Stage 3, the interviewee who had finished being interviewed were asked to remain separated from and not to share interview-related questions with other interviewees who had yet been interviewed. Also, the employers were also asked not to inquire the interviewees about the responses given during the interview.</i>			

## APPENDIX B.

### STRUCTURED INTERVIEW QUESTIONS

#### B1 GROUP INTERVIEW

	Subcontracted agricultural workers	Subcontractors	Sugar producer
<b>Getting general information</b>			
What is your name and your role/position in your workplace?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Please describe your work position and/or responsibility.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Please describe the general relationship between you and your employers (or employees).	<input type="radio"/>	<input type="radio"/>	
Please describe the general relationship between you and the sugar producers.		<input type="radio"/>	
Please describe the general relationship between you and your suppliers.			<input type="radio"/>
<b>On supply-chain</b>			
To your knowledge, please describe the supply-chain, e.g. what happens to all sugar canes once you deliver them to your employers (or sugar producers).	<input type="radio"/>	<input type="radio"/>	
To your knowledge, please describe the entire supply-chain of your sugar producing business.			<input type="radio"/>
Besides working in the sugar cane plantations, do you also work somewhere else? If so, where?	<input type="radio"/>		

## B2 INDIVIDUAL INTERVIEW

	Subcontracted agricultural workers	Subcontractors	Sugar producer
<b>Exploring negative impacts</b>			
Please describe your current working condition, e.g. hours of work, wage, welfare, etc.	<input type="radio"/>		
Please describe the working condition of your subcontracted agricultural workers.		<input type="radio"/>	<input type="radio"/>
What is your level of satisfaction on your current working condition, on the scale of 1-10, and why?	<input type="radio"/>		
What is your level of satisfaction of the working condition of your subcontracted agricultural workers, on the scale of 1-10, and why?		<input type="radio"/>	<input type="radio"/>
If there are any problems associated with your current working condition, please specify.	<input type="radio"/>		
What are other problems, apart from your working condition?	<input type="radio"/>		
If there are any problems associated with the current working condition of your subcontracted agricultural workers, please specify.		<input type="radio"/>	<input type="radio"/>
What are other problems, apart from the working condition of your subcontracted agricultural workers?		<input type="radio"/>	<input type="radio"/>
<b>On seeking remedy</b>			
How do you respond to problems (if any)?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
What types of problems are the ones that you feel they must be reported, and why?	<input type="radio"/>		
What types of problems are the ones that you feel they should be addressed and resolved, and why?		<input type="radio"/>	<input type="radio"/>
What types of problems are the ones that you tend to disregard, and why?	<input type="radio"/>		
What types of problems are the ones that you feel they are negligible, and why?		<input type="radio"/>	<input type="radio"/>
To whom did you report or, if occur, do you plan to report such problems, and why?	<input type="radio"/>		
To your knowledge, what are available channels for you to seek remedy?	<input type="radio"/>		



What are currently available channels (or procedures) for your employees to seek remedy?		<input type="radio"/>	<input type="radio"/>
Are you familiar with resolving remedy through judicial grievance mechanism, such as Court?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If you ever have to go to Court, what is the first step? And what are the following procedures?	<input type="radio"/>		
What are advantages and disadvantages of existing judicial grievance mechanisms?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
What are reasons behind your decision to or not to go to Court to resolve the complaint?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How was your experience, if any, with seeking remedy through judicial mechanisms?	<input type="radio"/>		
How was your experience, if any, with resolving complaints through judicial mechanisms?		<input type="radio"/>	<input type="radio"/>
Have you ever considered seeking remedy through other non-judicial channels, such as the NHRC?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<b>On operational-level grievance mechanisms</b>			
To your knowledge, what is an operational-level grievance mechanism?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
What is your first impression when you learn of an operational-level grievance mechanism?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are your employers currently offering an operational-level grievance mechanism?	<input type="radio"/>		
Are you currently offering an operational-level grievance mechanism to your employees, and why?		<input type="radio"/>	<input type="radio"/>
Do you extend the applicability of your operational-level grievance mechanism to non-employees who work in your supply-chain, such as subcontracted agricultural workers? Why (or why not)?			<input type="radio"/>
What are reasons behind your decision to or not to go to the operational-level grievance mechanism provided by your employers to resolve the dispute?	<input type="radio"/>		
What motivated you (your company) to develop procedures to address complaints from your employees and/or the affected non-employees such as subcontracted agricultural workers?			<input type="radio"/>
Please describe the elements of your system, e.g. receiving and assessing complaints, addressing and resolving issues, etc.			<input type="radio"/>

How was your experience, if any, with seeking remedy through an operational-level grievance mechanism provided by your employers?	<input type="radio"/>		
If you cannot seek remedy from your employers and Courts, who else would you try to seek remedy from?	<input type="radio"/>		
Do you think the sugar producer, in general, should provide an operational-level grievance mechanism? What about the sugar producer which produce the sugar cane you harvest?	<input type="radio"/>		
Do you know or have any connection with the sugar producers which produce the sugar cane you harvest? How and how well do you know or have such connection?	<input type="radio"/>		
Do you know or have any connection with the subcontracted agricultural workers working in your supply-chain? How and how well do you know or have such connection?			<input type="radio"/>
If applicable, how and how often do you communicate with the sugar producer?	<input type="radio"/>		
If applicable, how and how often do you communicate with the subcontracted agricultural workers working in your supply-chain?			<input type="radio"/>
Are the sugar producer (that you know or have connection with) currently offering an operational-level grievance mechanism?	<input type="radio"/>		
To your knowledge, what are the procedures of an operational-level grievance mechanism provided by the sugar producer?	<input type="radio"/>	<input type="radio"/>	
What are reasons behind your decision to or not to go to the operational-level grievance mechanism provided by the sugar producer to resolve the dispute? What are your concerns?	<input type="radio"/>	<input type="radio"/>	
How was your experience, if any, with seeking remedy through an operational-level grievance mechanism provided by the sugar producer?	<input type="radio"/>	<input type="radio"/>	
If applicable, were there any barriers preventing you from accessing the operational-level grievance mechanism provided by the sugar producer?	<input type="radio"/>		
Hypothetically, what are potential barriers preventing you from accessing the operational-level grievance mechanism provided by the sugar producer?	<input type="radio"/>		
What would be your recommendations for establishing or improving the operational-level grievance mechanism provided by the sugar producer?	<input type="radio"/>	<input type="radio"/>	

Between your employers and the sugar producer, who should be responsible for providing an operational-level grievance mechanism, and why? E.g. whom do you trust more?	○		
<b>(exclusively for sugar producer)</b>			
What is the overarching purpose of your operational-level grievance mechanism?			○
Are you familiar with the UNGP?			○
To your knowledge, what are the UNGP, particularly on the “effectiveness criteria” for operational-level grievance mechanism?			○
What are (or should be) issues that are eligible to be addressed by your operational-level grievance mechanism?			○
How were (or should) the procedures of the operational-level grievance mechanism developed? Unilaterally or in collaboration with other companies?			○
Have you experienced any resistance both inside and outside of your company?			○
Please describe the organization, the location and the staffing of your operational-level grievance mechanism.			○
How do you ensure the effectiveness of your operational-level grievance mechanism, e.g. staff training, community training, quality control and evaluation?			○
Please describe the standard and/or criteria used to resolve complaints at your operational-level grievance mechanism.			○
Please describe the dissemination/communication strategy. How do you promote the existence of your operational-level grievance mechanism?			○
How do affected parties access to your operational-level grievance mechanism, e.g. filing complaints?			○
Are affected parties using your operational-level grievance mechanism?			○
What are barriers that prevent affected parties from using your operational-level grievance mechanism?			○
What are challenges or consequences that your operational-level grievance mechanism has encountered in the development and/or implementation process, e.g. cultural appropriateness, dissemination of knowledge, customary or traditional method of dispute resolution, budget?			○
What are key issues that should be addressed for future development and improvement of operational-level grievance mechanism in general?			○

# APPENDIX C.

## CONSENT FORM

### C1 CONSENT FORM

**Full title of Project:**

Ensuring Accessibility of Agricultural Workers to Non-State-Based, Non-Judicial Grievance Mechanisms: A Qualitative Study on Selected Agricultural Industry in Thailand

**Name and position of Researcher:**

Mr. Pawat Satayanurug, a PhD researcher at University of Zurich

**Please initial box**

- |    |                                                                                                                                    |                          |
|----|------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| 1. | I confirm that I have read and understand the information sheet for the above Study and have had the opportunity to ask questions. | <input type="checkbox"/> |
| 2. | I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason.                 | <input type="checkbox"/> |
| 3. | I agree to take part in the above Study.                                                                                           | <input type="checkbox"/> |

**Please initial box**

- |                                                                                                                               | Yes                      | No                       |
|-------------------------------------------------------------------------------------------------------------------------------|--------------------------|--------------------------|
| 4. I agree to the interview / focus group / consultation being audio recorded.                                                | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. I agree to the interview / focus group / consultation being video recorded.                                                | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. I agree to the use in publications of statements I made, with full attribution to me.                                      | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. I agree to the use in publications of anonymized quotes of statements I made.                                              | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. I agree that my data gathered in this Study may be stored in a specialist data center and may be used for future research. | <input type="checkbox"/> | <input type="checkbox"/> |

E-mail address:

Contact number:

_____ Name and Designation of Participant	_____ Contact Information	_____ Date and Place	_____ Signature
 <b>Pawat Satayanurug</b> <b>Rämistrasse 74</b> <b>8001, Zürich, Switzerland</b>	 E-mail addresses: <b>psatayanurug@gmail.com</b> Contact number: <b>+41 78 635 3553 (Swiss)</b> <b>+66 82 445 9955 (Thai)</b>	 <b>11 July 2016;</b> <b>Zürich,</b> <b>Switzerland</b>	 _____ Signature
_____ Name and Address of Researcher	_____ Contact Information	_____ Date and Place	

## C2 CONSENT FORM (Thai translation)

### หนังสือยินยอม(แปล)

#### ชื่อโครงการ

การวิจัยเชิงคุณภาพเกี่ยวกับการเข้าถึงกระบวนการเยียวยาความเสียหายของแรงงานเกษตรในประเทศไทย ศึกษาเฉพาะกระบวนการที่จัดทำขึ้นโดยหน่วยงานที่ไม่ใช่ภาครัฐ

#### ชื่อและตำแหน่งของผู้วิจัย

นายภาวิณ์ สัตยานุรักษ์ (นักวิจัยและนักศึกษาระดับปริญญาเอก มหาวิทยาลัยซูริก)

โปรดลงนาม (ย่อ)

- ข้าพเจ้ายืนยันว่า ข้าพเจ้าได้รับและเข้าใจข้อมูลเบื้องต้นของงานวิจัย และมีเอกสารตามผู้วิจัย ☐
- ข้าพเจ้าเข้าใจว่า การเข้าร่วมในโครงการวิจัยนี้เป็นไปด้วยความสมัครใจ และสามารถเพิกถอนความสมัครใจได้ทุกเวลา โดยไม่ต้องระบุเหตุผล ☐
- ข้าพเจ้ายินยอมเข้าร่วมโครงการวิจัยนี้ ☐

โปรดลงนาม (ย่อ)  
ยินยอม ไม่ยินยอม

- ข้าพเจ้ายินยอมให้มีการบันทึกเสียงการสัมภาษณ์ ☐ ☐
- ข้าพเจ้ายินยอมให้มีการบันทึกภาพการสัมภาษณ์ ☐ ☐
- ข้าพเจ้ายินยอมให้เผยแพร่และตีพิมพ์คำพูดของข้าพเจ้า โดยจะต้องมีการอ้างอิงอย่างถูกต้อง ☐ ☐
- ข้าพเจ้ายินยอมให้เผยแพร่และตีพิมพ์คำพูดของข้าพเจ้า โดยไม่เปิดเผยชื่อของข้าพเจ้า ในการตีพิมพ์งานวิจัยนี้ ☐ ☐
- ข้าพเจ้ายินยอมให้เก็บข้อมูลที่ข้าพเจ้าให้สัมภาษณ์เพื่อโครงการวิจัยนี้ ในฐานะข้อมูลพิเศษ และอาจนำข้อมูลดังกล่าวมาใช้สำหรับการวิจัยในอนาคตได้ ☐ ☐

อีเมล:  
เบอร์ติดต่อ:

ชื่อและตำแหน่งของผู้เข้าร่วม

ข้อมูลติดต่อ

วันและสถานที่

ลงนาม

นายภาวิณ์ สัตยานุรักษ์  
Rämistrasse 74  
8001, Zürich, Switzerland

อีเมล:  
psatayanurug@gmail.com  
เบอร์ติดต่อ:  
+41 78 635 3553 (สวิส)  
+66 82 445 9955 (ไทย)

11 ก.ค. 2559;  
ซูริค,  
สมาพันธรัฐสวิส

ชื่อและที่อยู่ของผู้วิจัย

ข้อมูลติดต่อ

วันและสถานที่

ลงนาม

## APPENDIX D.

### DEMOGRAPHY OF INTERVIEWEES

#### D1 SUBCONTRACTED AGRICULTURAL WORKERS

Location		Number of interviewees
<i>Buriram</i>	Plantation 1	7
	Plantation 2	5
<i>Khon Kaen</i>	Plantation 3	6
	Plantation 4	8
Total		26
*Due to request for anonymity, the names of interviewees are kept confidential.		

#### D2 SUBCONTRACTORS

Location	Number of interviewees
<i>Buriram</i>	2
<i>Khon Kaen</i>	1
Total	3
*Due to request for anonymity, the names of interviewees are kept confidential.	

#### D3 SUGAR PRODUCER

Location	Number of interviewees
<i>Mitr Phol Sugar Corp. Ltd</i>	2
Total	2
<b>Names of interviewees</b> 1) Dr. Sarayuth Saengchan, Senior Executive Vice-President Finance Group Mitr Phol Sugar Corp. Ltd, Bangkok 2) Mr. Boontham Wongprapinkul, Vice-President and Human Resources Department Mitr Phol Sugar Corp. Ltd, Bangkok	

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## CURRICULUM VITAE

### Personal Information

Pawat Satayanurug

Born on 09.02.1987 in Bangkok, Thailand

### Education

- 2012-2013      Master of Laws (LL.M.) awarded 30.05.2013  
*Harvard Law School, Cambridge, MA, U.S.A.*  
(LL.M. paper received a High Pass; courses taken were international human rights law, seminar in international law, international trafficking law, global law and governance, immigration law and tort law.)
- 2009-2010      Master of Laws (LL.M.) awarded 26.06.2010  
*University of Cambridge, United Kingdom*  
(Upper-second class honors (2.i); courses taken were foundations of international law, international criminal law, international intellectual property law, and international commercial litigation.)
- 2005-2009      Bachelor of Laws (LL.B.) awarded 06.07.2009  
*Chulalongkorn University, Bangkok, Thailand*  
(First class honors, GPAX 3.82 (out of 4.00); major in international law.)
- 1993-2005      Primary and Secondary Levels  
*Assumption College, Bangkok, Thailand*

### Work Experience

- Since 2011      Lecturer  
*Faculty of Law, Chulalongkorn University*  
*Bangkok, Thailand*
- 2010-2011      Lecturer  
*Graduate School of Law*  
*National Institute of Development Administration*  
*Bangkok, Thailand*